

# Justiciability of Socio-Economic Rights: Comparative Powers, Roles, and Practices in the Philippines and South Africa

*Diane A. Desierto*<sup>\*</sup>

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This paper proposes a theory of justiciability for socio-economic rights as specified in Article II, §§ 8–24, Article XIII–XV of the 1987 Philippine Constitution.<sup>1</sup> While these provisions had been previously declared as the “heart of the new [1987] Charter”<sup>2</sup>, subsequent

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<sup>\*</sup> LLM 2008-2009, Yale Law School; Law Reform Specialist, Institute of International Legal Studies (IILS), University of the Philippines; Professorial Lecturer (Legal History, Agency & Partnership), University of the Philippines College of Law; Professorial Lecturer (Public International Law, Administrative Law), Lyceum of the Philippines College of Law; LLB cum laude, University of the Philippines College of Law; BS Economics summa cum laude, University of the Philippines School of Economics. I am grateful to the former President of the Israeli Supreme Court, Aharon Barak, for valuable guidance and supervision in preparing this paper. All errors and omissions are solely mine. [diane.desierto@yale.edu](mailto:diane.desierto@yale.edu)

<sup>1</sup> CONST. (1987), ART. II, §§ 8-24, ART. XIII–XV (Phil.) [hereinafter 1987 Constitution].

<sup>2</sup> ARIS Inc. v. Nat’l Labor Relations Comm’n, G.R. No. 90501, (S.C. Aug. 5,

jurisprudence of the Philippine Supreme Court has treated these constitutional norms as little more than aspirational, non-self-executing, and ultimately mere hortatory guidelines for the Legislative and Executive Branches.<sup>3</sup>

A closer look at the formative history of the 1987 Constitution exposes structural considerations that militate against automatic non-justiciability of socio-economic rights. Article VIII, § 1 of the postcolonial and post-dictatorship 1987 Constitution uniquely expanded the Philippine Supreme Court's power of judicial review beyond the traditional justiciability threshold,<sup>4</sup> towards wider review of government discretion.<sup>5</sup> A corollary expansion of the Court's rule-making powers accompanied the enlargement of the sphere of judicial review. Article VIII, § 5(5) gives the Court the power to "promulgate rules concerning . . . the enforcement of constitutional rights."<sup>6</sup>

From the standpoint of judicial power, the Philippine Supreme Court has been vested with constitutional authority to determine its own parameters of justiciability with respect to constitutionally-textualized socio-economic rights. The Court's own practice of relaxing justiciability constraints in cases of "threshold constitutional importance" affirms the malleability of justiciability doctrine beyond the frontiers of the six-pronged test in *Baker v. Carr*.<sup>7</sup> This deliberate expansion of both the judicial review and rule-making powers of the Philippine Supreme Court typifies the active re-direction of the Court's role, away from the passivity under the standard political question doctrine that had predominated earlier constitutional eras under the 1973 and 1935 Constitutions.

Moreover, the drafting history of the 1987 Constitution belies any intent to diminish the constitutional importance of socio-economic rights, as opposed to civil and political rights. The 1986 Constitutional Commission repeatedly referred to international legal standards on socio-economic rights (particularly the International Covenant on Economic, Social, and Cultural Rights) to introduce specific constitutional prescriptions, and not mere normative aspirations. This places greater responsibility on Philippine judges to carefully determine whether

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1991), available at <http://sc.judiciary.gov.ph/>

<sup>3</sup> *Basco v. Phil. Amusements & Gaming Corp.*, G.R. No. 91649, (S.C. May 14, 1991) (en banc), available at <http://sc.judiciary.gov.ph/>.

<sup>4</sup> CONST. (1987), ART. VIII, § 1 (Phil.) ("the duty of courts of justice to settle actual controversies which are legally demandable and enforceable").

<sup>5</sup> *Id.* ("to determine whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the Government").

<sup>6</sup> CONST. (1987), ART. VIII, § 5(5) (Phil.).

<sup>7</sup> *Baker v. Carr*, 369 U.S. 186, 82 S.Ct. 691 (1962).

justiciability is constitutionally-intended, or, conversely, if justiciability had been purposely ruled out by the framers of the 1987 Constitution.

Justiciability can be re-conceptualized with sensitivity towards the Court's use and understanding of its powers, roles, and practices under the 1987 Constitution. To this end, the jurisprudence of the South African Constitutional Court on socio-economic rights provides rich comparative insights into judicial methodology and interpretation. Cognizant of its historic and constitutional role, the South African Constitutional Court has long transcended the usual objections of enforceability and lack of government resources to adjudicate cases involving governmental distributive programs that impact on socio-economic rights. Exemplar cases such as *Republic of South Africa v. Grootboom*,<sup>8</sup> *Minister of Health v. Treatment Action Campaign*,<sup>9</sup> and *Soobramoney v. Minister of Health*,<sup>10</sup> among others, show that socio-economic rights and governmental duties can indeed be calibrated in modern constitutional adjudication.

Drawing from comparative South African scholarship, this paper proposes a triangulated theory ("Purpose-Role-Norm") to assist the Philippine Supreme Court in determining the justiciability of socio-economic rights under the 1987 Constitution. First, the Court could look to the purpose of the justiciability constraint, and whether maintaining the traditionally high justiciability threshold set by *Baker v. Carr* is consistent with this purpose. This framework deliberately espouses Professor Jonathan R. Siegel's methodology in his work, *A Theory of Justiciability* 86 TEX. L. REV. 73 (2007).<sup>11</sup>

Second, the Court should also look to their constitutional role, and whether, under its expanded judicial review and rule-making powers, the Court may adjudicate the case or controversy involving socio-economic rights. This analytical prong should be examined in tandem with the third aspect to this theory, which is to look at the norm as constitutionally-formulated. By considering both the constitutional text and its corresponding drafting history, the Court can better determine whether the Constitutional provision contemplates an actionable right, as opposed to a non-self-executing norm requiring Congressional implementation.

The foregoing triangulated theory has not been absent or unattempted in jurisprudential methodology. However, much of the difficulty with determining the propriety of the Court's adjudication of socio-economic provisions under the 1987 Constitution lies with eliciting methodological consistency, and how the Court may provide for the

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<sup>8</sup> *Republic of South Africa v. Grootboom*, 2001 (1) SA 46 (CC) (S. Afr.).

<sup>9</sup> *Minister of Health v. Treatment Action Campaign*, 2002 (5) SA 721 (CC) (S.Afr.).

<sup>10</sup> *Soobramoney v. Minister of Health*, 1998 (1) SA 765 (CC) (S. Afr.).

<sup>11</sup> Jonathan R. Siegel, *A Theory of Justiciability*, 86 TEX. L. REV. 73 (2007).

predictability and stability of constitutional outcomes. The well-documented experience of the South African Constitutional Court has much to impart regarding its consciousness of the Court's role and powers under the South African Charter. The South African Constitutional Court also valuably demonstrates a decided predisposition to adjudicate socio-economic rights notwithstanding usual governmental resource limitations. At the very least, this proposed triangulated theory aspires to prevent offhand dismissals of Philippine constitutional cases on socio-economic rights, by inducing the Philippine Supreme Court to periodically and systematically revisit its constitutional powers, roles, and practices.

### I. INTRODUCTION

We are living in a society in which there are great disparities involved. Millions of people are living in deplorable conditions and in great poverty. There is a high level of unemployment, inadequate social security, and many do not have access to clean water or to adequate health services. These conditions already existed when the Constitution was adopted and a commitment to address them, and to transform our society into one in which there will be human dignity, freedom and equality lies at the heart of our new constitutional order. For as long as these conditions continue to exist that aspiration will have a hollow ring.

— Justice Arthur Chaskalson, President of the South African Constitutional Court<sup>12</sup>

Indeed, in countries where the task of maintaining body and soul and together is getting more and more to be a mission impossible, man's efforts should be focused in enhancing the socio-economic rights of the vulnerable in our society. For what good is not being arrested if one is already incarcerated by the prison of poverty? What good is freedom of expression if the only idea you can mumble are words begging for food? What good is freedom to think on the part of the ignorant who is even ignorant of his ignorance? What good is the right to property to him who is shirtless, shoeless, and roofless? What good are political and civil rights to those whose problem is how to be human?

Let me conclude by saying that total human liberation requires not only the preservation of political and civil rights but demands the enjoyment by our people of their socio-economic

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<sup>12</sup> *Soobramoney v. Minister of Health*, 1997 (12) BCLR 1696 (CC) at para. 8 (S. Afr.).

rights. Only then can we translate the dream of Rizal into reality that in every person there is self-worth that the State should bring to life. In Rizal's immortal words: "[Because] every being in creation has his spur, his mainspring; man's is his self-respect; take it away from him and he becomes a corpse; and he who seeks activity in a corpse will only find worms."

— Chief Justice Reynato Puno, Philippine Supreme Court<sup>13</sup>

On February 25, 1986, hundreds of thousands of Filipinos of diverse political affiliations, religious persuasions, and ideological proclivities assembled at Epifanio de los Santos Avenue (EDSA) in Metropolitan Manila, peaceably demanding the ouster of then-President Ferdinand Marcos. In his twenty-year dictatorship, Marcos had seized all governmental power and left all other political institutions in stasis under a sham democracy, where "[t]he Executive rules by decree. There is no legislature, no elections, and very little judicial review. The people are not allowed to choose their representatives. Citizens languish in jails without charge, many since Martial Law was declared. Military authority is supreme."<sup>14</sup> During Marcos' twenty-year dictatorship, the Philippine Supreme Court had been packed with loyal Marcos appointees. The Court became instrumental to legitimating the dictatorship regime when it upheld the constitutionality of various presidential decrees that steadily (and often surreptitiously) expanded Marcos' executive and legislative powers. Parallel with this practice, the Court also frequently invoked the political question doctrine to bar judicial review of many of Marcos' acts during the dictatorship.<sup>15</sup> A historical text authorized by the Philippine Supreme Court characterizes this strategy as one among several forms of judicial accommodation made with the authoritarian regime:

[T]he courts gave their cooperation and support to the dictatorship and to its program for a New Society under a new constitutional order. That was their best choice. Supposing that, because of their attachment to constitutionalism, they had resisted the dictatorship, the courts would simply have been replaced by military tribunals. The judges of the period had the sagacity and the

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<sup>13</sup> Chief Justice Reynato Puno, Philippine Supreme Court, Socioeconomic Rights and Globalization (May 4, 2007), *available at* [http://sc.judiciary.gov.ph/speech/Socio-economic.htm#\\_ftn1](http://sc.judiciary.gov.ph/speech/Socio-economic.htm#_ftn1) (quoting Jose Rizal, *Indolence of the Filipinos*, in 194 *LA SOLIDARIDAD* (1890)).

<sup>14</sup> WILLIAM J. BUTLER, JOHN P. HUMPHREY & G.E. BISSON, *THE DECLINE OF DEMOCRACY IN THE PHILIPPINES* 9 (International Commission of Jurists ed., 1971).

<sup>15</sup> Myrna Feliciano, *The Philippine Constitution: Its Development, Structures, and Processes*, reprinted in *CONSTITUTIONAL AND LEGAL SYSTEMS OF ASEAN COUNTRIES*, 173, 173–250 (Carmelo V. Sison ed., University of the Philippines 1990).

foresight to trust the political leadership, and despite their misgivings, follow its path toward a promised constitutional order. It was by such faith and hope that we can justify their collaboration in strategies and measures which, in the fateful months of late 1972 and early 1973, were antithetical and destructive of republicanism. Indeed, looking at the period as a whole, the Judiciary as an institution was basically preserved and functioning all throughout, without disruption or disturbance.<sup>16</sup>

In the face of Marcos' overwhelming dominance of the Court, then-Chief Justice Roberto Concepcion (who was not a Marcos appointee, and would frequently spearhead the dissenting minority in many of the cases broadening Marcos' executive powers), was constrained to declare in *Javellana v. Executive Secretary* that "[t]his being the vote of the majority, there is no further judicial obstacle to the new Constitution being considered in force and effect."<sup>17</sup>

When the 1986 EDSA "People Power" Revolution successfully ousted Marcos, one of the first acts of the new government under Corazon Aquino (and facilitated by now Constitutional Commissioner Roberto Concepcion) was to strengthen the independence and judicial review powers of the Philippine Supreme Court. Under the 1987 Constitution, the Philippine Supreme Court was intentionally entrusted with broader judicial review and rule-making powers. The framers of the 1987 Constitution envisioned that the Court as the institution most critical to safeguarding democracy in the Philippines' post-dictatorship constitutional order.<sup>18</sup> Wary of the Court's reputational decline in *Javellana*, the Philippine Supreme Court under the 1987 Constitution reiterated fidelity to the Constitution as the foremost mandate of judicial conduct: "Justices and judges must ever realize that they have no constituency, serve no majority nor minority but serve only the public interest as they see it in accordance with their oath of office, guided only by the Constitution and their own conscience and honour."<sup>19</sup>

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<sup>16</sup> THE HISTORY OF THE PHILIPPINE JUDICIARY 578-79 (The Philippine Judiciary Foundation ed., 1998) [hereinafter THE HISTORY OF THE PHILIPPINE JUDICIARY]. The observation does not appear devoid of empirical evidence. See C. Neal Tate & Stacia L. Haynie, *Authoritarianism and the Functions of Courts: A Time Series Analysis of the Philippine Supreme Court, 1961-1987*, 27 LAW & SOC'Y REV. 707, (1993).

<sup>17</sup> Otherwise known as the "Ratification Cases," *Javellana v. Executive Sec'y*, G.R. No. L-36142 (Mar. 31, 1973) (Phil.), available at <http://sc.judiciary.gov.ph/>. This case declared the effectivity of the 1973 Constitution, and in turn, paved the way for Marcos' decade-long extension of his presidential term. The Ratification Cases "legalized" the Marcos regime, and lent the pretense of legitimacy to Marcos' arrogation of absolute power as President of the Philippines.

<sup>18</sup> See THE HISTORY OF THE PHILIPPINE JUDICIARY, *supra* note 16.

<sup>19</sup> *Galman v. Sandiganbayan*, G.R. No. 72670, (Sept. 12, 1986) (en banc),

Currently, the Philippine Supreme Court enjoys a greater level of public confidence and perception of trust than most other institutions of the national government.<sup>20</sup> While the Court has not been immune from recent attacks on its impartiality (especially with its present composition dominated by a majority of appointees of the incumbent President Gloria Macapagal-Arroyo),<sup>21</sup> the Court remains credible regarding two spheres of contestation—the narrow concerns of private rights adjudication, and the broader issues of public policy legitimation. Rightly or wrongly, Filipinos under the postcolonial and post-dictatorship 1987 Constitution appear to look to the Philippine Supreme Court as the most definitive voice of public reason.<sup>22</sup>

Not unlike the Philippine Supreme Court's institutional evolution alongside political reform, the South African Constitutional Court's path to establishment and entrenchment in South Africa's constitutional culture should be read within the post-apartheid struggles that define a new politico-social order in South Africa. The South African Constitutional Court emerged in 1994 under South Africa's 1993 Interim Constitution, and continues to exercise its mandate under the final Constitution of 1996.<sup>23</sup> The creation of the South African Constitutional Court

was enveloped in intense and highly political conflict, in part because all actors were able to foresee the power and importance of the Court in South African politics. Conflict over the Court's structure was publicized widely, which probably undermined the initial legitimacy of the institution to at least some degree . . . the Constitutional Court was conceived in controversy, continues to be involved in the most contentious social issues, and has not been timid in offending various constituencies. Ironically, it suffers at

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available at <http://sc.judiciary.gov.ph/>.

<sup>20</sup> See Social Weather Station (SWS) comparative trust approval ratings of Philippine institutions from 2000 to 2009, available at <http://www.sws.org.ph/pr051103.htm> (last visited Nov. 26, 2009). Op-Ed, *The Supreme Court Earns Public Confidence*, MANILA BULLETIN, Jan. 16, 2002, available at <http://www.highbeam.com/doc/1G1-82031514.html> (last visited Nov. 30, 2009).

<sup>21</sup> See Stacia L. Haynie, *Paradise Lost: Politicisation of the Philippine Supreme Court in the Post Marcos Era*, 22 ASIAN STUD. REV. 459–473, (1998); Mike Frialde, *Spare us from politics – Supreme Court*, PHILIPPINE STAR, Jan. 12, 2009, available at <http://www.philstar.com/Article.aspx?articleid=431093> (last visited Nov. 10, 2009); Russell Hardin, DISTRUST 307–311 (Russell Hardin ed., Russell Sage Foundation 2004).

<sup>22</sup> Haynie, *supra* note 21, at n7. See Stacia L. Haynie, *Resource Inequalities and Litigation Outcomes in the Philippine Supreme Court*, 56 THE J. OF POL. 752–772 (1994).

<sup>23</sup> See History of the Constitutional Court of South Africa, <http://www.constitutionalcourt.org.za/site/thecourt/history.htm> (last visited Nov. 10, 2009).

once from an understandable identification with the ANC [African National Congress], which undoubtedly undermines its legitimacy among the whites, and from an image in some quarters as much too timid in its approach to constitutional development, too willing to protect the white minority, allied with the regular judiciary, and too slow to reflect the racial diversity of society at large.<sup>24</sup>

Notwithstanding its politically-chequered history, the Court continues to enjoy relative institutional security. It has issued principled judgments with high technical legal quality, even in the face of adverse public opinion or political criticism.<sup>25</sup>

Both the Philippine Supreme Court and the South African Constitutional Court occupy privileged positions in shaping public political-social discourses in their respective countries. The Philippine Supreme Court has progressively demonstrated its liberal (and judicially activist) stances by recognizing the fullest protections of international standards on civil and political rights as “part of the law of the land.” Long before the adoption of the 1987 Constitution, Philippine jurisprudence had already recognized the incorporation of various international human rights and humanitarian law instruments in the Philippine legal system. Over thirty years before the promulgation of the 1987 Constitution, the Philippine Supreme Court applied the Universal Declaration of Human Rights as “generally accepted principles of international law [forming] part of the law of the Nation” to rule against the indefinite detention of foreign nationals or stateless aliens.<sup>26</sup> Nearly two decades since the adoption of the 1987 Constitution, a unanimous Philippine Supreme Court stressed the *obligatory effect* imposed by a postwar Supreme Court on the Universal Declaration of Human Rights (UDHR) in the Philippines. Relying on the incorporation of the UDHR as generally accepted principles of international law forming part of the law of the land, the unanimous Court in the 2007 case of *Hong Kong Special*

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<sup>24</sup> James L. Gibson & Gregory A. Caldeira, *Defenders of Democracy? Legitimacy, Popular Acceptance, and the South African Constitutional Court*, 65 THE J. OF POL. 1, 6–8 (2003).

<sup>25</sup> Theunis Roux, *Principle and Pragmatism on the Constitutional Court of South Africa*, 7 INT’L J. CONST. L. 106, 118–125 (2009).

<sup>26</sup> *Mejoff v. Dir. of Prisons*, G.R. No. L-4254, (S.C. Sept. 26, 1951) (en banc), available at <http://sc.judiciary.gov.ph/>; *Borovsky v. Comm’r of Immigration*, G.R. No. L-4352, (S.C. Sept. 28, 1951), available at <http://sc.judiciary.gov.ph/>. See *Duran v. Santos*, G.R. No. L-99, (S.C. Nov. 16, 1945) (en banc), available at <http://sc.judiciary.gov.ph/>. In *Duran*, Justice Gregorio Perfecto issued a strong dissent against the Supreme Court’s refusal to grant a Filipino political prisoner’s petition for bail: “The denial of the petition is violative of the fundamental rights guaranteed, not only by the Constitution of the Philippines, but also by the Charter of the United Nations, which is now in full force in this country.”



*Administrative Region v. Olalia* affirmed the correctness of a lower court order granting bail to a potential extraditee. Thus, the Court departed from previous jurisprudence that limited the exercise of the right to bail to criminal proceedings.<sup>27</sup>

Despite its landmark recognition of the UDHR's legal effect in the Philippines, however, the Philippine Supreme Court has been reluctant to provide similar recognition to socio-economic rights that are already textualized in Articles II, XIII, IV, and XV of the 1987 Constitution. In *Basco v. Phil. Amusements & Gaming Corp.*,<sup>28</sup> the Court expressly held that several provisions of Article XIII (*Social Justice and Human Rights*) and XIV (*Education, Science and Technology, Arts, Culture and Sports*) of the 1987 Constitution "are merely statements of principles and policies. As such, they are basically not self-executing, meaning a law should be

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<sup>27</sup> Hong Kong Special Administrative Region v. Olalia, G.R. No. 153675, (S.C. Apr. 19, 2007) (en banc), available at <http://sc.judiciary.gov.ph/>.

Thus, on December 10, 1948, the United Nations General Assembly adopted the Universal Declaration of Human Rights in which the right to life, liberty, and all the other fundamental rights of every person were proclaimed. While not a treaty, the principles contained in the said Declaration are now recognized as customarily binding upon the members of the international community. Thus, in *Mejoff v. Director of Prisons*, this Court, in granting bail to a prospective deportee, held that under the Constitution, the principles set forth in that Declaration are part of the law of the land. In 1966, the UN General Assembly also adopted the International Covenant on Civil and Political Rights which the Philippines signed and ratified. Fundamental among the rights enshrined therein are the rights of every person to life, liberty, and due process.

The Philippines, along with the other members of the family of nations, committed to uphold the fundamental human rights as well as value the worth and dignity of every person. This commitment is enshrined in Section II, Article II of our Constitution which provides: 'The State values the dignity of every human person and guarantees full respect for human rights.' The Philippines, therefore has the responsibility of protecting and promoting the right of every person to liberty and due process, ensuring that those detained or arrested can participate in the proceedings before a court, to enable it to decide without delay on the legality of the detention and order their release if justified. In other words, the Philippine authorities are under obligation to make available to every person under detention such remedies which safeguard their fundamental right to liberty. These remedies include the right to be admitted to bail. While this Court in *Purganan* limited the exercise of the right to bail to criminal proceedings, however, in light of the various international treaties giving recognition and protection to human rights, particularly the right to life and liberty, a reexamination of this Court's ruling in *Purganan* is in order.

<sup>28</sup> *Basco v. Phil. Amusements & Gaming Corp.*, G.R. No. 91649, (S.C. May 14, 1991) (en banc), available at <http://sc.judiciary.gov.ph/>.

passed by Congress to clearly defined and effectuate such principles.”<sup>29</sup> Other than this bare declaration, however, the Court did not provide a methodology for differentiating between justiciable and non-justiciable socio-economic provisions under the 1987 Constitution.

Unlike the Philippine Supreme Court, the South African Constitutional Court appears more progressive in developing jurisprudence on socio-economic rights adjudication. It has produced a body of jurisprudence that not only recognizes the actionability of socio-economic rights,<sup>30</sup> but also contains a consistent methodology for paring away the usual conceptual barriers underlying non-justiciability of socio-economic rights, such as resource constraints.

In this respect, the South African Constitutional Court’s methodology for determining justiciability of socio-economic rights has immense value for the Philippine Supreme Court. As a self-imposed *institutional* restraint that is not constitutionally-defined, the narrowness or breadth of justiciability is calibrated according to the nature and scope of a court’s institutional competence. The South African Constitutional Court has used its institutional role more effectively than the Philippine Supreme Court because the South African Court has developed nuanced justiciability principles that take into consideration socio-economic rights. Under its innovative justiciable principles, the South African Constitutional Court exceeds the traditional, self-limiting boundaries that other comparable courts have adopted. By considering the justiciability of socio-economic rights, the South African Constitutional Court also considers its own role and function within a democracy. The South African Constitutional Court’s socio-economic rights jurisprudence is the quintessential example of “purposive interpretation,” where judges accept clear textual meanings but also consider the objective purposes of statutes, or “the interests, values, objectives, policy, and functions that the law should realize in a democracy.”<sup>31</sup>

Given their similar institutional powers and roles, the South African Constitutional Court provides a viable model upon which the Philippine Supreme Court may develop its own doctrine of constitutional socio-economic rights adjudication. Part I of this paper discusses the problem of justiciability of socio-economic rights within the Philippine

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<sup>29</sup> *Id.*

<sup>30</sup> Certification of the Constitution of the Republic of South Africa 1996 (4) SA 744 (CC) paras. 1–19, 76–78 (S. Afr.); Soobramoney v. Minister of Health 1998 (1) SA 765 (CC) para. 8 (S. Afr.); Republic of South Africa v. Grootboom 2001 (1) SA 46 (CC) para. 2 (S. Afr.); Minister of Health v. Treatment Action Campaign (No. 2) 2002 (5) SA 721 (CC) (S.Afr.); State v. Makwanyane 1995 (3) SA 391 (CC) (S.Afr.); Khosa v. Minister of Social Dev. 2004 (6) SA 505 (CC) (S.Afr.); Jaffa v. Schoeman 2005 (2) SA 140 (CC) (S. Afr.).

<sup>31</sup> AHARON BARAK, THE JUDGE IN A DEMOCRACY 125–127, 138 (Princeton University Press 2006).

constitutional system. Part II then examines the South African Constitutional Court's adjudication of socio-economic rights, and the interpretive methodologies that the Court uses to override objections based on non-justiciability. Drawing from the South African Constitutional Court's methodology, Part III proposes a triangulated theory, inspired by the "purposive interpretation" model, for Philippine judges to re-evaluate the justiciability of socio-economic rights under the 1987 Philippine Constitution. Not all socio-economic rights specified in the 1987 Philippine Constitution are automatically deemed justiciable, but under the triangulated theory ("Purpose-Role-Norm") it is possible to ascertain which specific constitutional provisions could be deemed justiciable. In the Conclusion, the paper emphasizes that justiciability under the 1987 Constitution is less an institutional barrier as it is a self-regulating mechanism. The extent to which the Philippine Supreme Court can effectively self-regulate depends, in large measure, on its recognition and use of its institutional role and powers. If the Court consciously acts in full expression of its constitutional role and powers, there should be a narrower gap between seemingly "aspirational" and "rights-discursive" norms in the 1987 Constitution.

## II. THE PROBLEM OF JUSTICIABILITY AND SOCIO-ECONOMIC RIGHTS IN THE PHILIPPINE CONSTITUTIONAL SYSTEM

### A. *Justiciability: Pre- and Post- 1987*

Before the promulgation of the 1987 Constitution, justiciability stood in sharp relief among Philippine constitutional doctrines as a wholesale adaptation of the six-pronged *Baker v. Carr* test.<sup>32</sup> Justiciability doctrine filters political questions<sup>33</sup> from the actual cases and controversies which courts may adjudicate. According to the *Baker v. Carr* test, a case involves a non-justiciable political question if there is:

a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack

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<sup>32</sup> See VINCENTE GUZMAN SINCO, PHILIPPINE POLITICAL LAW: PRINCIPLES AND CONCEPTS (Community Publishers 1962); ENRIQUE M. FERNANDO, THE CONSTITUTION OF THE PHILIPPINES (Central Lawbook Publishing Co. 1974).

<sup>33</sup> *Sanidad v. Comm'n on Elections*, G.R. No. L-44640, (S.C. Oct. 12, 1976) (en banc), available at <http://sc.judiciary.gov.ph/> ("Political questions are neatly associated with the wisdom, of the legality of a particular act. Where the vortex of the controversy refers to the legality or validity of the contested act, that matter is definitely justiciable or non-political.").

of respect due coordinate branches of the government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.<sup>34</sup>

The pre-1987 Philippine Supreme Court adopted the *Baker v. Carr* test to characterize various controversies during the Marcos dictatorship as issues involving political questions, and therefore not subject to judicial review.<sup>35</sup>

The 1987 Constitution, however, revolutionized the scope of judicial review, and necessarily provoked constitutional rethinking on the traditional justiciability doctrine. Article VIII, § 1 of the 1987 Constitution is a broader formulation of the power of judicial review than in previous Philippine Constitutions:

The judicial power shall be vested in one Supreme Court and in such lower courts as may be established by law.

Judicial power includes the duty of the courts of justice to settle actual controversies involving rights which are legally demandable and enforceable, and to determine whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the Government.<sup>36</sup>

Unlike the United States Constitution, which does not expressly textualize judicial review,<sup>37</sup> Article VIII, § 1 of the 1987 Constitution expressly establishes judicial review in the Philippine constitutional system. The Philippine Supreme Court dates the initial exercise of judicial review (through invalidation of constitutionally infirm legislative acts) back to 1902, stating that the executive and legislative branches effectively acknowledged the power of judicial review in provisions of the Civil Code that mandated consistency of legislative, administrative, and executive acts with the Constitution as a requirement for legality.<sup>38</sup> This

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<sup>34</sup> *Baker v. Carr*, 369 U.S. 186, 217, 82 S. Ct. 691, 710 (1962). See *Cabasing v. Aquino*, G.R. No. L-38025, (S.C. Aug. 20, 1979), available at <http://sc.judiciary.gov.ph/>.

<sup>35</sup> See *In re Aquino v. Enrile*, G.R. No. L-35546, (S.C. Sept. 17, 1974) (en banc), available at <http://sc.judiciary.gov.ph/>; *In re Morales v. Enrile*, G.R. No. L-6106, (S.C. Apr. 26, 1983) (en banc), available at <http://sc.judiciary.gov.ph/>.

<sup>36</sup> CONST. (1987), ART. VII, § 1 (Phil.).

<sup>37</sup> *Marbury v. Madison*, 5 U.S. 137 (1803) elicited the principle of judicial review from the “particular phraseology” of the US Constitution that was “supposed to be essential to all written constitutions.”

<sup>38</sup> *Francisco v. House of Representatives*, G.R. No. 160261, (S.C. Nov. 10, 2003) (en banc), available at <http://sc.judiciary.gov.ph/> (citing Supreme Court Justice Vicente V. Mendoza in *SHARING THE PASSION AND ACTION OF OUR TIME* 62-53 (2003)). In *Francisco*, the Court cited Article 7, Civil Code of the Philippines:

provision of the 1987 Constitution expanded the *certiorari* jurisdiction of the Supreme Court to include cases of “grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the Government.”<sup>39</sup> As noted by the Court, the rationale for this expansion is attributable to the experience of martial law under the Marcos dictatorship. Former Chief Justice and 1986 Constitutional Commissioner Roberto Concepcion proposed the expansion to avoid repetition of the Court’s experience in failing to resolve crucial human rights cases due to the obstacle of the political question doctrine:

Fellow Members of this Commission, this is actually a product of our experience during martial law. As a matter of fact, it has some antecedents in the past, but the role of the judiciary during the deposed regime was marred considerably by the circumstance that in a number of cases against the government, which then had no legal defense at all, the solicitor general set up the defense of political questions and got away with it. As a consequence, certain principles concerning particularly the writ of *habeas corpus*, that is, the authority of courts to order the release of political detainees, and other matters related to the operation and effect of martial law failed because the government set up the defense of political question. And the Supreme Court said: “Well, since it is political, we have no authority to pass upon it.” The Committee on the Judiciary feels that this was not a proper solution of the questions involved. It did not merely request an encroachment upon the rights of the people, but it, in effect, encouraged further violations thereof during the martial law regime.

Briefly stated, courts of justice determine the limits of power of the agencies and offices of the government as well as those of its officers. In other words, the judiciary is the final arbiter on the question whether or not a branch of government or any of its officials has acted without jurisdiction or in excess of jurisdiction or so capriciously as

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Article 7. Laws are repealed only by subsequent ones, and their violation or non-observance shall not be excused by disuse, or custom or practice to the contrary.

When the courts declare a law to be inconsistent with the Constitution, the former shall be void and the latter shall govern.

Administrative or executive acts, orders, and regulations shall be valid only when they are not contrary to the laws or the Constitution.

<sup>39</sup> CONST. (1987), ART. VII, § 1 (Phil.).

to constitute an abuse of discretion amounting to excess of jurisdiction or lack of jurisdiction. This is not only a judicial power but a duty to pass judgment on matters of this nature.

This is the background of paragraph 2 of Section 1, which means that the courts cannot hereafter evade the duty to settle matters of this nature, by claiming that such matters constitute a political question.<sup>40</sup>

Dean Pacifico Agabin places the counter-majoritarian objection against such an expansion of judicial review within the context of the Court's historic ideological conservatism, stating that the "pendulum of judicial power [has swung] to the other extreme where the Supreme Court can now sit as 'superlegislature' and 'superpresident.' If there is such a thing as judicial supremacy, this is it."<sup>41</sup> Article VIII, § 1 is a constitutional policy to give a "heavier weighting of the judicial role in government," according to former Supreme Court Justice Florentino Feliciano, as a reflection of the "strong expectations in [Philippine] society concerning the ability and willingness of our Court to function as part of the internal balance of power arrangements, and somehow to identify and check or contain the excesses of the political departments."<sup>42</sup> Former Supreme Court Justice Santiago Kapunan cautioned, however, against the "inherently antidemocratic" nature of the expanded judicial review power:

This brings me to one more important point: The idea that a norm of constitutional adjudication could be lightly brushed aside on the mere supposition that an issue before the Court is of paramount public concern does great harm to a democratic system which espouses a delicate balance between three separate but coequal branches of government. It is equally of paramount public concern, *certainly paramount to the survival of our democracy*, that acts of the other branches of government are accorded due respect by this Court. Such acts, done within their sphere of competence, have been—and should always be—accorded with a presumption of regularity. When such acts are assailed as illegal or unconstitutional, the burden falls upon those who assail these acts to prove that they satisfy the essential norms of constitutional adjudication, because

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<sup>40</sup> *Francisco v. House of Representatives* at n.26.

<sup>41</sup> Pacifico A. Agabin, *The Politics of Judicial Review over Executive Action: The Supreme Court and Social Change*, in UNCONSTITUTIONAL ESSAYS 194, 167–98 (University of the Philippines Press 1996).

<sup>42</sup> Florentino P. Feliciano, *The Application of Law: Some Recurring Aspects of the Process of Judicial Review and Decision Making*, 37 AM. J. JURIS. 17, 27 (1992).

when we finally proceed to declare an act of the executive or legislative branch of our government unconstitutional or illegal, *what we actually accomplish is the thwarting of the will of the elected representatives of the people in the executive or legislative branches of government.* Notwithstanding Article VIII, Section 1 of the Constitution, since the exercise of the power of judicial review by this Court is *inherently antidemocratic*, this Court should exercise a becoming modesty in acting as a *revisor* of an act of the executive or legislative branch. The tendency of a frequent and easy resort to the function of judicial review, particularly in areas of economic policy has become lamentably too common as to dwarf the political capacity of the people expressed through their representatives in the policy making branches of the government and to deaden their sense of moral responsibility.<sup>43</sup>

Clearly, the expansion of judicial review is a constitutional policy that does not immunize Philippine courts from politics. Former Supreme Court Associate Justice Feliciano affirms that a court fulfills dual functions (“deciding” as opposed to “law-making”) in the three-pronged process of applying legal norms to any given controversy before it: (1) determination of the operative facts; (2) determination of the applicable legal or normative prescriptions; and (3) relating the applicable prescriptions to the operative facts.<sup>44</sup> Inevitably, the elasticity of the Court’s use of its power of judicial review under the “grave abuse of discretion” standard in Article VIII, § 1 of the 1987 Constitution would depend to a significant extent on the rationality, predispositions, and value judgments of the majority of the members of the Court.<sup>45</sup>

Since the promulgation of the 1987 Constitution, Filipino individuals and citizens’ groups have sought recourse to the expanded judicial review power of the Supreme Court to directly file petitions for writs to annul, enjoin, or prohibit governmental acts that violate fundamental human rights and civil liberties, or to compel governmental conduct towards observance of such rights and liberties. In the words of the Court, this expansion of judicial power “is an antidote to and a safety

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<sup>43</sup> See *Kilosbayan Inc. v. Guingona*, G.R. No. 113375, (S.C. May 5, 1994) (Kapunan, J., dissenting) (emphasis added), available at <http://sc.judiciary.gov.ph/>.

<sup>44</sup> *Id.* at 34–36 n.29.

<sup>45</sup> The Supreme Court admitted the elasticity of the “grave abuse of discretion” standard, citing Justice Isagani A. Cruz, in the landmark anti-logging case of *Oposa v. Factoran*, G.R. No. 101083, (S.C. July 30, 1993), available at <http://sc.judiciary.gov.ph/> (stating that an “intergenerational” right to a healthful and balanced ecology was sufficient to grant standing to petitioners who sued on behalf of minors and generations yet unborn).

net against whimsical, despotic, and oppressive exercise of governmental power.”<sup>46</sup> As such, the expansion of the Court’s power of judicial review contemplates any governmental deprivation of rights within the penumbra of the individual’s constitutionally-guaranteed rights to life, liberty, and due process.<sup>47</sup>

Over the last two decades since the promulgation the 1987 Constitution, the Court has issued writs and/or resolved cases on fundamental civil liberties and basic constitutional rights guarantees using its expanded judicial review power, including, among others: (1) nullifying administrative rules and regulations issued by the executive department that contravened the constitutionally-mandated agrarian reform program;<sup>48</sup> (2) affirming the constitutional right to a fair and a speedy trial;<sup>49</sup> (3) affirming a lower court judgment finding the government’s use of arrest, detention, or deportation orders to be illegal and arbitrary;<sup>50</sup> (4) enjoining the military and police’s conduct of warrantless arrests and searches, “aerial target zonings or “saturation drives” in areas where alleged subversives were supposedly hiding;<sup>51</sup> (5) declaring search warrants defective and the ensuing seizure of private properties to be illegal;<sup>52</sup> (6) acquitting a person whose conviction for murder was based largely on an inadmissible extrajudicial confession (obtained without the presence of counsel);<sup>53</sup> (7) upholding the dismissal

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<sup>46</sup> *Macabago v. Comm’n on Elections*, G.R. No. 152163, (S.C. Nov. 18, 2002), available at <http://sc.judiciary.gov.ph/>.

<sup>47</sup> *See People of the Philippines v. Andal*, G.R. Nos. 138268-69, (S.C. May 26, 1999) (en banc), available at <http://sc.judiciary.gov.ph/>.

<sup>48</sup> *Luz Farms v. Sec’y of the Dep’t of Agrarian Reform*, G.R. No. 86889, (S.C. Dec. 4, 1990) (en banc), available at <http://sc.judiciary.gov.ph/>.

<sup>49</sup> *Abadia v. Ct. of App.*, G.R. No. 105597, Sept. 23, 1994 (en banc), available at <http://sc.judiciary.gov.ph/>.

<sup>50</sup> *Domingo v. Scheer*, G.R. No. 154745, (S.C. Jan. 29, 2004), available at <http://sc.judiciary.gov.ph/>.

<sup>51</sup> *Guazon v. De Villa*, G.R. No. 80508, (S.C. Jan. 30, 1990), available at <http://sc.judiciary.gov.ph/>. *See also* *People of the Philippines v. Sarap*, G.R. No. 132165, (S.C. Mar. 26, 2003), available at <http://sc.judiciary.gov.ph/>; *People of the Philippines v. Tudtud*, G.R. No. 144037, (S.C. Sept. 26, 2003), available at <http://sc.judiciary.gov.ph/>; *Caballes v. Ct. App.*, G.R. No. 136292, (S.C. Jan. 15, 2002), available at <http://sc.judiciary.gov.ph/>; *People of the Philippines v. Molina*, G.R. No. 133917, (S.C. Feb. 19, 2001), available at <http://sc.judiciary.gov.ph/>; *People of the Philippines v. Gamer*, G.R. No. 115984, (S.C. Feb. 29, 2000), available at <http://sc.judiciary.gov.ph/>.

<sup>52</sup> *Republic of the Philippines v. Sandiganbayan*, G.R. No. 104768, (S.C. July 21, 2003), available at <http://sc.judiciary.gov.ph/>. *See also* *People of the Philippines v. Salangga*, G.R. No. 100910, (S.C. July 25, 1994), available at <http://sc.judiciary.gov.ph/>; *People of the Philippines v. Simbahon*, G.R. No. 132371, (S.C. Apr. 9, 2003), available at <http://sc.judiciary.gov.ph/>.

<sup>53</sup> *People of the Philippines v. Tomaquin*, G.R. No. 133188, (S.C. July 23, 2004),



of a criminal charge on the basis of the constitutional right against double jeopardy;<sup>54</sup> (8) acquittal of a public officer due to a violation of the constitutional right of the accused to a speedy disposition of her case;<sup>55</sup> (9) prohibiting the compelled donation of print media space to the Commission on Elections without payment of just compensation;<sup>56</sup> and (10) prohibiting governmental restrictions on the publication of election survey results for unconstitutionally abridging the freedom of speech, expression, and the press.<sup>57</sup>

Apart from its expanded power of judicial review, the Court has also been vested with considerable rule-making powers unheard of in previous constitutional eras. Article VIII, § 5(5) of the 1987 Constitution vests the Supreme Court with the authority to promulgate rules “concerning the protection and enforcement of constitutional rights”:

Sec. 5. The Supreme Court shall have the following powers:

...

. . . (5) Promulgate rules concerning the protection and enforcement of constitutional rights, pleading, practice, and procedure in all courts, the admission to the practice of law, the Integrated Bar, and legal assistance to the underprivileged. Such rules shall provide a simplified and inexpensive procedure for the speedy disposition of cases, shall be uniform for all courts of the same grade, and shall not diminish, increase, or modify substantive rights. Rules of procedure of special courts and quasi-judicial bodies shall remain effective unless disapproved by the Supreme

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available at <http://sc.judiciary.gov.ph/>. See also *People of the Philippines v. Janson*, G.R. No. 125938, (S.C. Apr. 4, 2003), available at <http://sc.judiciary.gov.ph/>; *People of the Philippines v. Ochate*, G.R. No. 127154, (S.C. July 30, 2002) (en banc), available at <http://sc.judiciary.gov.ph/>; *People of the Philippines v. Arondain*, G.R. Nos. 131864-65, (S.C. Sept. 27, 2001) (en banc), available at <http://sc.judiciary.gov.ph/>; *People of the Philippines v. Muleta*, G.R. No. 130189, (S.C. June 25, 1999), available at <http://sc.judiciary.gov.ph/>.

<sup>54</sup> *People of the Philippines v. Verra*, G.R. No. 134732, (S.C. May 29, 2002), available at <http://sc.judiciary.gov.ph/>.

<sup>55</sup> *Marcos v. Sandiganbayan*, G.R. No. 126995, (S.C. Oct. 6, 1998) (en banc), available at <http://sc.judiciary.gov.ph/>.

<sup>56</sup> *Phil. Press Inst. Inc. v. Comm’n on Elections*, G.R. No. 119694, (S.C. May 22, 1995) (en banc), available at <http://sc.judiciary.gov.ph/>.

<sup>57</sup> *Soc. Weather Stations Inc. v. Comm’n on Elections*, G.R. No. 147571, (S.C. May 5, 2001) (en banc), available at <http://sc.judiciary.gov.ph/jurisprudence/2001/may2001/147571.htm>. See *In Re Jurado*, A.M. No. 93-2-037 SC, 243 SCRA 299, (Apr. 6, 1995) (en banc) (Phil.).

Court.<sup>58</sup>

The Supreme Court's authority to promulgate rules "concerning the protection and enforcement of constitutional rights" is a formulation unique to the 1987 Constitution, nowhere found in the rule-making power of the Court as expressed in the 1973 Constitution and the 1935 Constitution.<sup>59</sup> Philippine Supreme Court Chief Justice Reynato Puno has publicly declared that the framers of the 1987 Constitution purposely expanded the Court's rule-making power in light of the fundamental importance of protecting individuals' constitutionally-guaranteed rights:

I respectfully submit further that the framers of the 1987 Constitution were gifted with a foresight that allowed them to see that the dark forces of human rights violators would revisit our country and wreak havoc on the rights of our people. With this all-seeing eye, they embedded in our 1987 Constitution a new power and vested it on our Supreme Court – the power to promulgate rules to protect the constitutional rights of our people. This is a radical departure from our 1935 and 1972 Constitutions, for the power to promulgate rules or laws to protect the constitutional rights of our people is essentially a legislative power, and yet it was given to the judiciary, more specifically to the Supreme Court. If this is disconcerting to foreign constitutional experts who embrace the tenet that separation of powers is the cornerstone of democracy, it is not so to Filipinos who survived the authoritarian years, 1971 to 1986. Those were the winter years of human rights in the Philippines. They taught us the lesson that in the fight for human rights, it is the judiciary that is our last bulwark of defense; hence, the people entrusted to the Supreme Court this right to promulgate rules protecting their constitutional rights.<sup>60</sup>

The foregoing interpretation of the Court's expanded rule-making power under the 1987 Constitution appears to have been adopted by the Court itself outside of specific jurisprudential pronouncement. There is no case, to date, that interprets the Constitutional intent behind the expansion of the Court's rule-making power under the 1987 Constitution. However,

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<sup>58</sup> CONST. (1987), ART. VIII, § 5(5) (Phil.).

<sup>59</sup> See CONST. (1973), ART. X, § 5(5) (Phil.); CONST. (1935) Art. VII, § 13 (Phil.).

<sup>60</sup> Reynato S. Puno, Chief Justice, Phil. Sup. Ct., No Turning Back on Human Rights, (Aug. 25 2007), available at <http://ia341243.us.archive.org/3/items/TextOfChiefJusticeReynatoPunoSillimanSpeech/PunoOnHumanRights.doc> (last visited Nov. 10, 2009).

when the Court promulgated the Rule on the *Writ of Amparo*<sup>61</sup> in October 2007, it also authorized the release of the *Annotation to the Writ of Amparo*.<sup>62</sup> In this *Annotation*, the Committee on Revision of the Rules of Court stated in no uncertain terms that the Supreme Court was purposely vested with this “additional power” to protect and enforce rights guaranteed by the 1987 Constitution:

The 1987 Constitution enhanced the protection of human rights by giving the Supreme Court the power to “[p]romulgate rules concerning the protection and enforcement of constitutional rights . . .” This rule-making power unique to the present Constitution, is the result of our experience under the dark years of the martial law regime. Heretofore, the protection of constitutional rights was principally lodged with Congress through the enactment of laws and their implementing rules and regulation. The 1987 Constitution, however, gave the Supreme Court the additional power to promulgate rules to protect and enforce rights guaranteed by the fundamental law of the land.

In light of the prevalence of extralegal killing and enforced disappearances, the Supreme Court resolved to exercise for the first time its power to promulgate rules to protect our people’s constitutional rights. Its Committee on Revision of the Rules of Court agreed that the writ of *amparo* should not be as comprehensive and all-encompassing as the ones found in some American countries, especially Mexico. . . . The Committee decided that in our jurisdiction, this writ of *amparo* should be allowed to evolve through time and jurisprudence and through substantive laws as they may be promulgated by Congress.<sup>63</sup>

Significantly, the *Annotation* does not refer to any portion of the Record of the 1986 Constitutional Commission that explains the expansion of the Court’s rule-making power. Given the Court’s

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<sup>61</sup> The Writ of Amparo is a form of judicial relief “available to any person whose right to life, liberty and security is violated or threatened with violation by an unlawful act or omission of a public official or employee, or of a private individual or entity,” and applies to “extralegal killings and enforced disappearances or threats thereof.” See full text available at [http://sc.judiciary.gov.ph/RULE\\_AMPARO.pdf](http://sc.judiciary.gov.ph/RULE_AMPARO.pdf) (last visited Nov. 26, 2009).

<sup>62</sup> Full text available at [http://sc.judiciary.gov.ph/Annotation\\_amparo.pdf](http://sc.judiciary.gov.ph/Annotation_amparo.pdf) (last visited Nov. 26, 2009).

<sup>63</sup> *Id.* at 2–3 (citation omitted).

pronouncement in this *Annotation*, however, it appears unlikely that the Court would countermand its own interpretation of its extended rule-making power under the 1987 Constitution. This interpretation of the Court's expanded rule-making power could similarly explain the Court's promulgation of the Rule on the *Writ of Habeas Data* in January 2008.<sup>64</sup> Noting the expansion of its powers of judicial review and rule-making, the Philippine Supreme Court nevertheless clarifies the hornbook tests of justiciability in the following manner:

A justiciable controversy is defined as a definite and concrete dispute touching on the legal relations of parties having adverse legal interests which may be resolved by a court of law through the application of a law. Thus, courts have no judicial power to review cases involving political questions and as a rule, will desist from taking cognizance of speculative or hypothetical cases, advisory opinions and cases that have become moot. The Constitution is quite explicit on this matter. It provides that judicial power includes the duty of the courts of justice to settle actual controversies involving rights which are legally demandable and enforceable. Pursuant to this constitutional mandate, courts, through the power of judicial review, are to entertain only real disputes between conflicting parties through the application of law. For the courts to exercise the power of judicial review, the following must be extant (1) there must be an actual case calling for the exercise of judicial power; (2) the question must be ripe for adjudication; and (3) the person challenging must have the "standing."

An actual case or controversy involves a conflict of legal rights, an assertion of opposite legal claims, susceptible of judicial resolution as distinguished from a hypothetical or abstract difference or dispute. There must be a contrariety of legal rights that can be interpreted and enforced on the basis of existing law and jurisprudence.

Closely related to the second requisite is that the question must be ripe for adjudication. A question is considered ripe for adjudication when the act being challenged has had a direct adverse effect on the individual challenging it.

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<sup>64</sup> See A.M. No. 08-1-16-SC ("Rule on the Writ of Habeas Data"). Full text at: [sc.judiciary.gov.ph/rulesofcourt/2008/jan/A.M.No.08-1-16-SC.pdf](http://sc.judiciary.gov.ph/rulesofcourt/2008/jan/A.M.No.08-1-16-SC.pdf) (last visited Nov. 28, 2009).

The third requisite is legal standing or *locus standi*. It is defined as a personal or substantial interest in the case such that the party has sustained or will sustain direct injury as a result of the governmental act that is being challenged, alleging more than a generalized grievance. The gist of the question of standing is whether a party alleges “such personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court depends for illumination of difficult constitutional questions.” Unless a person is injuriously affected in any of his constitutional rights by the operation of statute or ordinance, he has no standing.<sup>65</sup>

Notwithstanding the above hornbook tests, however, the Philippine Supreme Court has frequently exercised its institutional discretion to accept various reasons to relax requirements on aspects of justiciability doctrine, such as standing, mootness, and ripeness.<sup>66</sup>

B. *Socio-economic rights under the 1987 Constitution: Text, Structure, Ideology, and Justiciability*

The 1987 Constitution contains multiple and specific provisions on socio-economic rights. Some are found in Article II (*Declaration of Principles and State Policies*), others in Articles XIII (*Social Justice and Human Rights*), XIV (*Education, Science and Technology, Arts, Culture, and Sports*), and XV (*The Family*). The particular categorization or grouping of a socio-economic right in any of these Articles seems immaterial to its justiciability. For example, Article II, § 15 (right to health) and § 16 (right of the people to a balanced and healthful ecology) formed the constitutional basis for standing in a class suit seeking the cancellation of Timber License Agreements (TLAs) in the landmark case of *Oposa v. Factoran*.<sup>67</sup> The unanimous Philippine Supreme Court

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<sup>65</sup> *Didipio Earth-Savers' Multipurpose Assoc. Inc. v. Sec'y Gozun*, G.R. No. 157882, (S.C. Mar. 30, 2006), available at <http://sc.judiciary.gov.ph/jurisprudence/2006/mar2006/157882.htm> (quoting CONST. (1987), ART. VIII, § 1 (Phil.) and *Integrated Bar of the Philippines v. Zamora*, G.R. No. 141284, (S.C. Aug. 15, 2009), available at <http://sc.judiciary.gov.ph/jurisprudence/2000/aug2000/141284.htm>).

<sup>66</sup> See *Joya v. Comm'n on Good Gov't.*, G.R. No. 96541, (S.C. Aug. 24, 1993) (en banc), available at <http://sc.judiciary.gov.ph/>; *Chavez v. Pub. Estates Auth.*, G.R. No. 133250, (S.C. July 9, 2002) (en banc), available at <http://sc.judiciary.gov.ph/>; *North Cotabato v. Republic of the Philippines*, G.R. No. 183591, (S.C. July 29, 2008) (Puno, C.J., separate and concurring opinion), available at <http://sc.judiciary.gov.ph/>.

<sup>67</sup> *Antonio v. Factoran*, G.R. No. 101083, (S.C. July 30, 1993) (en banc), available at <http://sc.judiciary.gov.ph/> (emphasis added) (citation omitted). This case has been repeatedly cited as a valuable municipal practice in international environmental law.

affirmed the constitutional importance of these rights in no uncertain terms:

The complaint focuses on one specific fundamental legal right—the right to a balanced and healthful ecology which, for the first time in our nation's constitutional history, is solemnly incorporated in the fundamental law. Section 16, Article II of the 1987 Constitution explicitly provides:

“Sec. 16. The State shall protect and advance the right of the people to a balanced and healthful ecology in accord with the rhythm and harmony of nature.”

This right unites with the right to health which is provided for in the preceding section of the same article:

“Sec. 15. The State shall protect and promote the right to health of the people and instill health consciousness among them.”

*While the right to a balanced and healthful ecology is to be found under the Declaration of Principles and State Policies and not under the Bill of Rights, it does not follow that it is less important than any of the civil and political rights enumerated in the latter. Such a right belongs to a different category of rights altogether for it concerns nothing less than self-preservation and self-perpetuation aptly and fittingly stressed by the petitioners the advancement of which may even be said to predate all governments and constitutions. As a matter of fact, these basic rights need not even be written in the Constitution for they are assumed to exist from the inception of humankind. If they are now explicitly mentioned in the fundamental charter, it is because of the well-founded fear of its framers that unless the rights to a balanced and healthful ecology and to health are mandated as state policies by the Constitution itself, thereby highlighting their continuing importance and imposing upon the state a solemn obligation to preserve the first and protect and advance the second, the day would not be too far when all else would be lost not only for the present generation, but also for those to come generations which stand to inherit nothing but parched earth incapable of sustaining life.*<sup>68</sup>

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<sup>68</sup> *Id.* (quoting CONST. (1987), ART. II, §§ 15, 16 (Phil.)).

Significantly, the Court in *Manila Prince Hotel v. Government Service Insurance System*<sup>69</sup> declared the presumption that a constitutional provision is self-executing, subject to textual examination:

Admittedly, some constitutions are merely declarations of policies and principles. Their provisions command the legislature to enact laws and carry out the purposes of the framers who merely establish an outline of government providing for the different departments of the governmental machinery and securing certain fundamental and inalienable rights of citizens. A provision which lays down a general principle, such as those found in Article II of the 1987 Constitution, is usually not self-executing. *But a provision which is complete in itself and becomes operative without the aid of supplementary or enabling legislation, or that which supplies sufficient rule by means of which the right it grants may be enjoyed or protected, is self-executing.* Thus a constitutional provision is self-executing if the nature and extent of the right conferred and the liability imposed are fixed by the constitution itself, so that they can be determined by an examination and construction of its terms, and there is no language indicating that the subject is referred to the legislature for action.

As against constitutions of the past, modern constitutions have been generally drafted upon a different principle and have often become in effect extensive codes of laws intended to operate directly upon the people in a manner similar to that of statutory enactments, and the function of constitutional conventions has evolved into one more like that of a legislative body. *Hence, unless it is expressly provided that a legislative act is necessary to enforce a constitutional mandate, the presumption now is that all provisions of the constitution are self-executing.* If the constitutional provisions are treated as requiring legislation instead of self-executing, the legislature would have the power to ignore and practically nullify the mandate of the fundamental law. This can be cataclysmic. That is why the prevailing view is, as it has always been, that

“... in case of doubt, the Constitution should be considered

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<sup>69</sup> *Manila Prince Hotel v. Gov't Serv. Ins. Sys.*, G.R. No. 122156, (S.C. Feb. 3, 1997) (en banc), available at <http://sc.judiciary.gov.ph/jurisprudence/1997/feb1997/122156.htm>.

self-executing rather than non-self-executing . . . . Unless the contrary is clearly intended, the provisions of the Constitution should be considered self-executing, as a contrary rule would give the legislature discretion to determine when, or whether, they shall be effective. These provisions would be subordinated to the will of the lawmaking body, which could make them entirely meaningless by simply refusing to pass the needed implementing statute.”<sup>70</sup>

Under the above presumption of the “self-executing” nature of constitutional provisions, it could be argued that the socio-economic rights in Articles II, XIII, XIV, and XV of the 1987 Constitution are indeed actionable rights that could be subject to judicial review. Unless the text of the provision expressly provides for necessary legislation, the socio-economic right cannot be characterized as non-justiciable.

Applying this textual filter to Articles II, XIII, XIV, and XV, the following socio-economic rights appear actionable:

- 1) Article II: right to health;<sup>71</sup> right to a balanced and healthful ecology;<sup>72</sup> rights of workers;<sup>73</sup> rights of indigenous cultural communities within the framework of national unity and development;<sup>74</sup> human rights;<sup>75</sup> parental rights;<sup>76</sup> fundamental equality before the law of women and men;<sup>77</sup> equal access to opportunities for public service.<sup>78</sup>
- 2) Article XIII: full protection to labor, rights of all workers to self-organization, collective bargaining and negotiations, peaceful concerted activities, right to strike, security of tenure, humane conditions of work, living wage, workers’ rights to participate in policy and decision-making processes affecting their rights and benefits;<sup>79</sup> right of

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<sup>70</sup> *Id.* (emphasis added) (quoting ISAGANI A. CRUZ, CONSTITUTIONAL LAW 8–10 (Central Lawbook Publishing Company 1994)).

<sup>71</sup> CONST. (1987), ART. II, § 15 (Phil.).

<sup>72</sup> *Id.* § 16.

<sup>73</sup> *Id.* § 18.

<sup>74</sup> *Id.* § 22.

<sup>75</sup> *Id.* § 11.

<sup>76</sup> *Id.* § 12.

<sup>77</sup> *Id.* § 14.

<sup>78</sup> *Id.* § 26.

<sup>79</sup> CONST. (1987), ART. XIII, § 3 (Phil.).



farmers, farmworkers, landowners, cooperatives, and other independent farmers' organizations to participate in the planning, organization and management of the agrarian reform program;<sup>80</sup> homestead rights of small settlers and the rights of indigenous communities to their ancestral lands;<sup>81</sup> rights of subsistence fishermen to the preferential use of local marine and fishing resources, both inland and offshore;<sup>82</sup> urban and poor dwellers' rights against arbitrary, unjust, and illegal eviction, and the right to adequate consultation before their relocation;<sup>83</sup> right of the people and their organizations to effective and reasonable participation at all levels of social, political, and economic decision-making, under consultation mechanisms provided by law.<sup>84</sup>

- 3) Article XIV: right of all citizens to quality education at all levels;<sup>85</sup> compulsory elementary education;<sup>86</sup> academic freedom;<sup>87</sup> rights of indigenous cultural communities to preserve and develop their cultures, traditions, and institutions.<sup>88</sup>
- 4) Article XV: right of spouses to found a family in accordance with their religious convictions and the demands of responsible parenthood;<sup>89</sup> right of children to assistance, including proper care and nutrition, and special protection from all forms of neglect, abuse, cruelty, exploitation, and other conditions prejudicial to their development;<sup>90</sup> right of the family to a family living wage and income;<sup>91</sup> right of families or family associations to

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<sup>80</sup> *Id.* § 5.

<sup>81</sup> *Id.* § 6.

<sup>82</sup> *Id.* § 7.

<sup>83</sup> *Id.* § 10.

<sup>84</sup> *Id.* § 16.

<sup>85</sup> CONST. (1987), ART. XIV, § 1 (Phil.).

<sup>86</sup> *Id.* § 2(2).

<sup>87</sup> *Id.* § 5(1).

<sup>88</sup> *Id.* § 17.

<sup>89</sup> CONST. (1987), ART. XV, § 3(1) (Phil.).

<sup>90</sup> *Id.* § 3(2).

<sup>91</sup> *Id.* § 3(3).

participate in the planning and implementation of policies and programs that affect them.<sup>92</sup>

The *Records of the 1986 Constitutional Commission* affirm that the framers of the 1987 Constitution specifically intended the new provisions of Article XIII on Social Justice and Human Rights to form the centerpiece of the new Charter.<sup>93</sup> In discussing their conceptions of socio-economic rights during the Charter deliberations, the 1986 Constitutional Commissioners repeatedly referred to the standards enshrined in the Universal Declaration of Human Rights and the International Covenant on Economic, Social, and Cultural Rights.<sup>94</sup> Most importantly, it appeared that the 1986 Constitutional Commissioners either did not foreclose or expressly recognized the possibility of seeking judicial relief on the basis of some of these rights alone as textualized in the 1987 Constitution.<sup>95</sup>

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<sup>92</sup> *Id.* § 3(4).

<sup>93</sup> 2 RECORDS OF THE CONSTITUTIONAL COMMISSION, (Flerida Ruth P. Romero ed. 1986) (Phil.). See also *ARIS Inc. v. Nat'l Labor Relations Comm'n*, G.R. No. 90501, (S.C. Aug. 5, 1991), available at <http://sc.judiciary.gov.ph/>.

<sup>94</sup> 2 RECORDS OF THE CONSTITUTIONAL COMMISSION, *supra* note 93. 4 RECORDS OF THE CONSTITUTIONAL COMMISSION Nos. 69, 29, 71, 1 (Flerida Ruth P. Romero ed. 1986) (Phil.). See also *Simon v. Comm'n on Human Rights*, G.R. No. 100150, (S.C. Jan. 5, 1994), available at <http://sc.judiciary.gov.ph/> (stating that the framers of the 1987 Constitution were well-aware and cognizant of the ICESCR when they drafted the Social Justice and Human Rights provisions in the Constitution); *Cent. Bank Employees Ass'n Inc. v. Bangko Sentral ng Pilipinas*, G.R. No. 148208, (S.C. Dec. 15, 2004), available at <http://sc.judiciary.gov.ph/jurisprudence/2004/dec2004/148208.htm> (discussing the international law principle of equality and prohibition against discrimination as part of the Constitutional formulation and development of the Social Justice and Human Rights provisions in the Constitution). This interactive approach on international and domestic socio-economic rights standards coincides with scholarly literature that proposes dissolution of the traditional, category-bound approach to socio-economic rights. See ISFAHAN MERALI & VALERIE OOSTERVELD, *GIVING MEANING TO ECONOMIC, SOCIAL, AND CULTURAL RIGHTS* (University of Pennsylvania Press 2001).

<sup>95</sup> 2 RECORDS OF THE CONSTITUTIONAL COMMISSION, *supra* note 93. Notice the same principle as illustrated in the following exchange between Commissioners Suarez and Bernas on the right to education:

MR. SUAREZ: I have been handling a number of cases in behalf of student demonstrators who were demanding quality education in the form of good teachers, good books, academic freedom, improved facilities. Will this statement "The State shall protect and promote the right of all citizens to quality education at all levels," be a license or permission for them to go before our courts and demand the protection which is provided under this provision?

FR. BERNAS: The answer would have to be in the affirmative, with proper explanation. If the school involved is a state school, then I think the State can easily answer that. But if the school involved is a private school, which is precisely in such situation because the State is not allowing a private school to collect the tuition that is necessary to raise

Otherwise stated, socio-economic rights *as a whole* were not intended to form a class of merely aspirational, and automatically non-justiciable, norms in the 1987 Constitution. Somewhat sporadically, the Philippine Supreme Court has recognized several socio-economic rights as legally demandable rights that could be subject to judicial review.<sup>96</sup> What is still lacking in these cases, however, is a clear and consistent methodology for differentiating justiciable socio-economic rights from non-justiciable, or aspirational socio-economic Charter provisions.

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its quality, then the private school would have a proper defense. This will awaken the eyes of the State to the fact that, if the private schools are to deliver quality education, then there must be some reasonableness in the regulation of tuition fees.

On the other hand, the Commissioners appeared clear on instances where they did not recognize a provision as containing a legally demandable right. Consider the following exchange between Commissioners Maambong and Sarmiento regarding the State's duty to "protect the life of the mother and the unborn from the moment of conception" CONST. (1987), ART. II, § 9 (Phil.):

MR. MAAMBONG: Mr. Presiding Officer, I just want to be clarified on whether this is really a demandable right in the legal sense of the word or it is merely an aspiration. Because if we say it is a demandable right, I fear for the government because as of now, as pointed out by the Commissioner, there are so many pregnant women in our countryside who can ill afford to go to the hospital and they are dying every day. I should know because I come from a barangay. And if this is a demandable right as stated by the Commissioner, how can the government absorb this burden if all these pregnant women who are not taken care of will go to court and file a case on the basis not of an ordinary law but of a constitutional precept? That is my problem.

MR. SARMIENTO: Considering the situation of our country, what we can say is that at this point in time, that principle is an aspiration. It is a goal that we wish to achieve.

<sup>96</sup> See *Alita v. Ct. of Appeals (Phil.)*, G.R. No. 78517, (S.C. Feb. 27, 1989), available at <http://sc.judiciary.gov.ph/> (regarding the rights of tenants under the government's agrarian reform program, where, for the first time under the 1987 Constitution, the Court cited Article XIII as a source of state duties and obligations); *Rance v. The Nat'l Labor Relations Comm'n*, G.R. No. 68147, (S.C. June 30, 1988), available at <http://sc.judiciary.gov.ph/> (discussing the constitutional right of workers to security of tenure); *Shauf. v. Ct. of App. (Phil.)*, G.R. No. 90314, (S.C. Nov. 27, 1990), available at <http://sc.judiciary.gov.ph/> (interpreting the constitutional policy of full protection over labor as authoritative basis against employment discrimination); *Ass'n of Ct. of App. Employees (Phil.) v. Ferrer-Calleja*, G.R. No. 94716, (Nov. 15, 1991), available at <http://sc.judiciary.gov.ph/>; *Globe-Mackay Cable & Radio Corp. v. Nat'l Labor Relations Comm'n*, G.R. No. 82511, (S.C. Mar. 3, 1992), available at <http://sc.judiciary.gov.ph/>; *La Bugal B'laan Tribal Ass'n v. Ramos*, G.R. No. 127882, (S.C. Jan. 27, 2004), available at <http://sc.judiciary.gov.ph/> (resolving the constitutionality of the Philippine Mining Act by considering the Constitution's Social Justice and Human Rights provisions, and by weighing the distributional consequences against the constitutional history of ownership and control of natural resources).

### III. THE SOUTH AFRICAN CONSTITUTIONAL COURT'S ADJUDICATION OF SOCIO-ECONOMIC RIGHTS

Similar to the 1987 Philippine Constitution, the 1996 Final Constitution of South Africa<sup>97</sup> expressly textualizes socio-economic rights. However, two material differences stand from the South African Charter text. First, unlike the 1987 Philippine Constitution which limits its Bill of Rights<sup>98</sup> to civil and political rights, the 1996 Final Constitution includes civil and political rights as well as socio-economic rights under its Bill of Rights (Chapter 2). Second, the South African Charter expressly provides terms of guidance on the application and implementation of its Bill of Rights. Chapter 2, § 8 of the 1996 Final Constitution states the rules for application thus:

#### Application

...

(1) The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.

(2) A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.

(3) When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court-

(a) in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and

(b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36 (1).

(4) A juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person.<sup>99</sup>

As seen above, South African courts have constitutional authorization to effectuate rights through the development of common law jurisprudence, in the absence of legislative implementation. This basic

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<sup>97</sup> S. AFR. CONST. 1996 [hereinafter 1996 Final Constitution].

<sup>98</sup> CONST. (1987), ART. III (Phil.).

<sup>99</sup> S. AFR. CONST. 1996 ch. 2, § 8.

pre-authorization probably explains the more vigorous judicial approaches taken by the South African courts regarding socio-economic rights. The South African Constitutional Court's particular methodology for deriving justiciability of socio-economic rights, however, is significant. As will be seen below, the Court's arrives at its determination of justiciability both from its recognition of its institutional role in the South African constitutional system, as well as from a jointly textual and purposive interpretation of the rights themselves in the 1996 Final Constitution.

A. *History and role of the South African Constitutional Court in the jurisprudential development of socio-economic rights*

Uniquely positioned in South Africa's constitutional system, the South African Constitutional Court developed socio-economic rights jurisprudence through an adept usage of its jurisdiction, powers, and institutional competence. A commentator on the South African Constitution describes the structure of the Court's composition, mandate, and functions in the following terms:

The Constitutional Court is of seminal importance for the implementation of the new dispensation in order to give credible and cogent effect to the supremacy of the Constitution and a human rights culture. Ultimately it was decided that the task of constitutional adjudication was too fundamental to be entrusted to the Appellate Division of the Supreme Court in Bloemfontein, since its legitimacy and moral authority in recent decades, particularly on crucial human rights issues, had been abysmal, and as a result it was too patently lacking in legitimacy for it to be expected to give expression boldly and imaginatively to the character and ethos of the new constitutional dispensation.

The Constitutional Court is manifestly intended to be the most esteemed court in the land because it is the ultimate guardian of the Constitution which is the supreme law of the Republic, which is the product of the Constitutional Assembly, an elected body representative of the whole nation. It consists of a President, a Deputy President and nine other judges. A matter before the Constitutional Court must be heard before at least eight judges. This eminent court, situated in Johannesburg, is declared to be the highest court in all constitutional matters in the Republic. It may, however, only decide constitutional matters, and issues connected with decisions on constitutional matters; and makes the final decision whether indeed a matter is a constitutional matter or whether an issue is connected with a decision on a

constitutional matter.

The Constitutional Court has exclusive jurisdiction in relation to certain matters listed in section 167(4) of the Constitution. Therefore, only the Constitutional Court may:

- (a) decide disputes between organs of the state in the national or provincial sphere concerning the constitutional status, powers, or functions of any of those organs of state;
- (b) decide on the constitutionality of any parliamentary or provincial Bill, but may do so only in the circumstances anticipated in section 79 or 121;
- (c) decide applications envisaged in section 80 or 122;
- (d) decide on the constitutionality of any amendment to the Constitution;
- (e) decide that parliament or the President has failed to fulfill a constitutional obligation; and
- (f) certify a provincial constitution in terms of section 144.

The Constitutional Court takes the final decision whether an Act of parliament, a provincial statute or conduct of the President is constitutional, and must confirm any order of invalidity made by the Supreme Court of Appeal, a High Court, or a court of similar status, before that order has any force. Therefore, the inconvenience created by adopting a centralised form of judicial review in the interim Constitution has been resolved in the 1996 Constitution by empowering the Supreme Court of Appeal and any High Court to decide on the validity of a parliamentary or provincial statute or any conduct of the President, while requiring that such order be confirmed by the Constitutional Court. From a conceptual and procedural point of view this is a decided improvement. . . . [T]he significance of this new formulation seems to be that the Constitutional Court is increasingly being positioned as an appellate court, despite section 167(6) of the 1996 Constitution which requires legislation providing for direct access to the Constitutional Court.<sup>100</sup>

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<sup>100</sup> G.E. DEVENISH, A COMMENTARY ON THE SOUTH AFRICAN CONSTITUTION 223–24 (Durban: Butterworths 1998).

The scope of the Court's judicial review, especially in effectuating human rights, is a new development in the South African constitutional system that enables the Court to take "an active and fairly independent path," but at the same time makes it pervious to critiques based on institutional legitimacy.<sup>101</sup> Against this critical backdrop, it has been observed that the Court has tended to be "highly consensual in its decision-making, with dissents in fewer than five percent of its cases. Presumably, members of the Court believe judicial unity goes some distance toward countering its image as an institution conceived in and engaged with partisan politics."<sup>102</sup>

The Court's role in developing socio-economic rights should also be read within the historical context of the inclusion of rights as embodied in the Bill of Rights.<sup>103</sup> Not unlike the 1987 Philippine Constitution, the minutes and memoranda in the drafting of these provisions in the South African Constitution show:

the strong influence of international law on the drafting of the relevant sections protecting socio-economic rights. For example, the concepts of progressive realisation and resource availability in sections 26 and 27 were based on article 2 of the International Covenant on Economic, Social, and Cultural Rights . . . According to the Technical Committee, this formulation has the dual advantage of facilitating consistency between South Africa's domestic law and international human rights norms, and directing the courts towards a legitimate international resource for the interpretation of these rights.<sup>104</sup>

Long before the approval of the 1996 Final Constitution, scholars had in fact argued that the textualization of socio-economic rights in the Constitution could operate as a strategic limitation on the threat of judicial overreaching.<sup>105</sup>

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<sup>101</sup> James L. Gibson, *The Evolving Legitimacy of the South African Constitutional Court*, in JUSTICE AND RECONCILIATION IN POST-APARTHEID SOUTH AFRICA 235, 229–66 (Cambridge University Press 2008). *But see* JOHN DUGARD, HUMAN RIGHTS AND THE SOUTH AFRICAN LEGAL ORDER (Princeton University Press 1978).

<sup>102</sup> Gibson, *supra* note 101, at 236.

<sup>103</sup> For a detailed chronological discussion on the history of the inclusion of socio-economic rights in the South African Constitution, *see generally* Eric C. Christiansen, *Adjudicating Non-justiciable Rights: Socio-Economic Rights and the South African Constitutional Court*, 38 COLUM. HUM. RTS. L. REV. 321 (2007).

<sup>104</sup> Sandra Liebenberg, *The Interpretation of Socio-Economic Rights*, in CONSTITUTIONAL LAW OF SOUTH AFRICA ch. 33.2 (Theunis Roux & Michael Bishop, eds., 2d ed. 2008), available at S. Afr. Const. 33.2 (Westlaw).

<sup>105</sup> Craig Scott & Patrick Macklem, *Constitutional Ropes of Sand or Justiciable*

Due to the complex economic, social, and cultural hierarchies and legal frameworks that fomented apartheid in South Africa, the constitutionalization of socio-economic rights contributed to legitimizing the new political order in post-apartheid South Africa, while warding off criticisms of the new Constitutional Court's seeming "political" supremacy over other governmental institutions.<sup>106</sup> As an inevitably political actor, therefore, the South African Constitutional Court influences the development of socio-economic rights by defining the latter's substantive content and application by other political branches. At the same time, its institutional legitimacy remains premised on how well it accomplishes the constitutional vision of socio-economic justice.<sup>107</sup>

B. *The South African Constitutional Court's Methodology for Deriving the Justiciability of Socio-economic Rights*

In *Certification of the Constitution of the Republic of South Africa*,<sup>108</sup> the South African Constitutional Court certified that the proposed final Constitution did not conflict with the Thirty-Four Principles previously agreed upon by the African National Congress, the outgoing white minority government, and the other political parties at the Convention for a Democratic South Africa. This case affirmed the inclusion of socio-economic rights in the final constitutional text. In this case, however, the Court expressly noted that nature and enforceability of socio-economic rights was materially different from other rights.<sup>109</sup> The

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*Guarantees? Social Rights in a New South African Constitution*, 141 U. PA. L. REV. 1 (1992).

<sup>106</sup> See Shedrack C. Agbakwa, *Reclaiming Humanity: Economic, Social, and Cultural Rights as the Cornerstone of African Human Rights*, 5 YALE HUM. RTS. & DEV. L. J. 177 (2002).

<sup>107</sup> Theunis Roux, *Legitimizing Transformation: Political Resource Allocation in the South African Constitutional Court*, in DEMOCRATIZATION AND THE JUDICIARY: THE ACCOUNTABILITY FUNCTION OF COURTS IN NEW DEMOCRACIES 92–111 (Frank Cass Publishers 2004).

<sup>108</sup> *Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC) (S.Afr.), available at <http://www.constitutionalcourt.org.za> (last visited Nov. 10, 2009) [hereinafter *Certification*].

<sup>109</sup> *Certification of the Amended Text of the Constitution of The Republic Of South Africa*, 1997 (2) SA 97 (CC) at para. 19 (S. Afr.), available at <http://www.constitutionalcourt.org.za> (last visited Nov. 10, 2009):

Article 6.1 of the International Covenant on Economic, Social and Cultural Rights ("ICESCR") ostensibly recognises the right of "everyone" to "the opportunity to gain his living by work which he freely chooses or accepts". But this right would be subject to what has been said in the preceding paragraph. Even more important is the fact that Article 2.3 of ICESCR itself allows developing countries "with due regard to human rights and their national economy" to "determine to what extent they would guarantee the economic rights recognized in the



earlier *Certification* judgment had already acknowledged that at a “minimum, socio-economic rights can be negatively protected from improper invasion.”<sup>110</sup> Justiciability, according to the Court, could not be barred simply due to the budgetary implications of the enforcement of these rights. Resource allocation and its distributive consequences form part of the ordinary course of rights enforcement:

It is true that the inclusion of socio-economic rights may result in courts making orders which have direct implications for budgetary matters. However, even when a court enforces civil and political rights such as equality, freedom of speech and the right to a fair trial, the order it makes will often have such implications. A court may require the provision of legal aid, or the extension of state benefits to a class of people who formerly were not beneficiaries of such benefits. In our view it cannot be said that by including socio-economic rights within a bill of rights, a task is conferred upon the courts so different from

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present Covenant to non-nationals”. It is subject to the even broader qualification in article 2.1 which makes it clear that the right in question is not fully enforceable immediately, each State Party only binding itself “to the maximum of its available resources” to “achieving progressively the full realization of the rights recognized in the present Covenant”. In no way do we intend to denigrate the importance of advancing and securing such rights. We merely point out that their nature and enforceability differ materially from those of other rights.

<sup>110</sup> Certification of the Constitution of the Republic of South Africa 1996 (4) SA 744 (CC) at para. 78 (S. Afr.), available at <http://www.constitutionalcourt.org.za> (last visited Nov. 10, 2009) states:

[78] The objectors argued further that socio-economic rights are not justiciable, in particular because of the budgetary issues their enforcement may raise. They based this argument on CP II which provides that all universally accepted fundamental rights shall be protected by “entrenched and justiciable provisions in the Constitution”. It is clear, as we have stated above, that the socio-economic rights entrenched in NT 26 to 29 are not universally accepted fundamental rights. For that reason, therefore, it cannot be said that their “justiciability” is required by CP II. *Nevertheless, we are of the view that these rights are, at least to some extent, justiciable.* As we have stated in the previous paragraph, many of the civil and political rights entrenched in the NT will give rise to similar budgetary implications without compromising their justiciability. *The fact that socio-economic rights will almost inevitably give rise to such implications does not seem to us to be a bar to their justiciability. At the very minimum, socio-economic rights can be negatively protected from improper invasion.* In the light of these considerations, it is our view that the inclusion of socio-economic rights in the NT does not result in a breach of the CPs. (emphasis added).

that ordinarily conferred upon them by a bill of rights that it results in a breach of the separation of powers.<sup>111</sup>

When the Court interprets the Bill of Rights, it would not merely conduct a standard examination of drafting history. More importantly, the Court would purposely consider the right in conjunction with the social and institutional contexts of its application.<sup>112</sup>

This purposive approach to interpretation was first applied to socio-economic rights in *Soobramoney v. Minister of Health*.<sup>113</sup> According to the Court, the purposive approach:

will often be one which calls for a generous interpretation to be given to a right to ensure that individuals secure the full protection of the bill of rights, but this is not always the case, and the context may indicate that in order to give effect to the purpose of a particular provision a “narrower or specific meaning” should be given to it.<sup>114</sup>

In this case, a patient suffering from chronic renal failure sued a public hospital to compel dialysis treatment, citing the right under Article 27(3) of the Bill of Rights not to be refused emergency medical treatment. Due to the limited number of dialysis machines, the hospital had established guidelines allocating use of the machines to patients whose medical conditions warranted them the most. The Constitutional Court took cognizance of the case as one presenting a justiciable controversy involving state duties to provide emergency medical treatment. Applying a reasonableness test to the hospital’s guidelines, however, the Court concluded that the right under Article 27(3) had not been violated under the facts of the case.<sup>115</sup>

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<sup>111</sup> *Id.* para. 77.

<sup>112</sup> See *State v. Makwanyane*, 1995 (3) SA 391 (CC) (S. Afr.), available at <http://www.constitutionalcourt.org.za> (last visited Nov. 10, 2009).

<sup>113</sup> *Soobramoney v. Minister of Health*, 1998 (1) SA 765 (CC) (S. Afr.), available at <http://www.constitutionalcourt.org.za> (last visited Nov. 10, 2009).

<sup>114</sup> *Id.* para. 17 (quoting *State v Makwanyane* 1995 (3) SA 391 (CC) at para. 325 (S. Afr.)).

<sup>115</sup> *Id.* para. 20–22:

[20] Section 27(3) itself is couched in negative terms—it is a right not to be refused emergency treatment. The purpose of the right seems to be to ensure that treatment be given in an emergency, and is not frustrated by reason of bureaucratic requirements or other formalities. A person who suffers a sudden catastrophe which calls for immediate medical attention, such as the injured person in *Paschim Banga Khet Mazdoor Samity v State of West Bengal*, should not be refused ambulance or other emergency services which are available and should not be turned away from a hospital which is able to provide the necessary treatment. What the section requires is that remedial

What is notable from both the *Certification* and *Soobramoney* cases is that the Constitutional Court deliberately severs the issue of enforceability (e.g. the availability of state resources) from how it determines justiciability. In *Republic of South Africa v. Grootboom*,<sup>116</sup> the Court held that the enforceability of a socio-economic right should be determined on a case-by-case basis. *Grootboom* involved a group of petitioners who had illegally occupied private land (already earmarked for low-cost housing) due to “intolerable conditions under which they were living while waiting in the queue for their turn to be allocated low-cost housing.”<sup>117</sup> The group petitioned for a court order requiring the South African government to provide them with adequate basic shelter until they obtained permanent accommodation, based on Sections 26 (right of access to adequate housing, and the obligation of the state to take reasonable legislative and other measures to ensure the progressive realization of the right within its available resources) and 28 (children’s right to shelter) of the Bill of Rights. *Grootboom* carried a clear restatement of the Court’s position on the justiciability of socio-economic rights:

[20] While the justiciability of socio-economic rights has been the subject of considerable jurisprudential and political debate, *the issue of whether socio-economic rights are justiciable at all in South Africa has been put beyond question by the text of our Constitution as construed in the Certification judgment.* During the certification proceedings before this Court, it was contended that they were not justiciable and should therefore not have been included in the text of the new Constitution. . . .

[ . . . ]

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treatment that is necessary and available be given immediately to avert that harm.

[21] The applicant suffers from chronic renal failure. To be kept alive by dialysis he would require such treatment two to three times a week. This is not an emergency which calls for immediate remedial treatment. It is an ongoing state of affairs resulting from a deterioration of the applicant’s renal function which is incurable. In my view section 27(3) does not apply to these facts.

[22] The appellant’s demand to receive dialysis treatment at a state hospital must be determined in accordance with the provisions of sections 27(1) and (2) and not section 27(3). These sections entitle everyone to have access to health care services provided by the state “within its available resources.”

<sup>116</sup> *Republic of South Africa v. Grootboom*, 2001 (1) SA 46 (CC) (S. Afr.), available at <http://www.constitutionalcourt.org.za> (last visited Nov. 10, 2009).

<sup>117</sup> *Id.*

Socio-economic rights are expressly included in the Bill of Rights; they cannot be said to exist on paper only. Section 7(2) of the Constitution requires the state “to respect, protect, promote and fulfill the rights in the Bill of Rights” and the courts are constitutionally bound to ensure that they are protected and fulfilled. *The question is therefore not whether socio-economic rights are justiciable under our Constitution, but how to enforce them in a given case. This is a very difficult issue which must be carefully explored on a case-by-case basis.* To address the challenge raised in the present case, it is necessary first to consider the terms and context of the relevant constitutional provisions and their application to the circumstances of this case. Although the judgment of the High Court in favour of the appellants was based on the right to shelter (section 28(1)(c) of the Constitution), it is appropriate to consider the provisions of section 26 first so as to facilitate a contextual evaluation of section 28(1)(c).<sup>118</sup>

The Court went further to require that the interpretation of socio-economic rights consider the matter within the context of the entire Constitution.

The state is obliged to take positive action to meet the needs of those living in extreme conditions of poverty, homelessness or intolerable housing. Their interconnectedness needs to be taken into account in interpreting the socio-economic rights, and in particular, in determining whether the state has met its obligations in terms of them.<sup>119</sup>

The Court treated the availability of the state’s resources as a legal standard forming part of the socio-economic right. As such, the availability of the state’s resources constitutes a factor aiding the Court’s assessment of the reasonableness of governmental action under a balancing test.<sup>120</sup> Most importantly, *Grootboom* demonstrates that the

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<sup>118</sup> *Id.* para. 20 (emphasis added).

<sup>119</sup> *Id.* para. 24.

<sup>120</sup> *Id.* para. 46:

[46] The third defining aspect of the obligation to take the requisite measures is that the obligation does not require the state to do more than its available resources permit. This means that both the content of the obligation in relation to the rate at which it is achieved as well as the reasonableness of the measures employed to achieve the result are governed by the availability of resources. Section 26 does not expect more of the state than is achievable within its available resources. . . .

availability of the state's resources is not an indicator of non-justiciability, but rather one of several axioms for ascertaining the reasonableness of the distribution of such resources. Thus, while the Court could not grant the petitioners' claims as worded, it did issue a declaratory order specifically requiring the government to undertake a comprehensive and coordinated state housing programme:

(a) Section 26(2) of the Constitution requires the state to devise and implement within its available resources a comprehensive and coordinated programme progressively to realise the right of access to adequate housing.

(b) The programme must include reasonable measures such as, but not necessarily limited to, those contemplated in the Accelerated Managed Land Settlement Programme, to provide relief for people who have no access to land, no roof over their heads, and who are living in intolerable conditions or crisis situations.

(c) As at the date of the launch of this application, the state housing programme in the area of the Cape Metropolitan Council fell short of compliance with the requirements in paragraph (b), in that it failed to make reasonable provision within its available resources for people in the Cape Metropolitan area with no access to land, no roof over their heads, and who were living in intolerable conditions or crisis situations.<sup>121</sup>

The Court implemented the same methodology on the justiciability of socio-economic rights in *Minister of Health v. Treatment Action Campaign*.<sup>122</sup> Petitioners in this case involved associations and civil society members concerned with HIV/AIDS treatment. The South African government had devised a nationwide programme for the distribution of the Nevirapine drug to prevent mother-to-child transmission of HIV. Referring once again to the *Certification* judgment, the Court declared that socio-economic rights are clearly justiciable rights:

The question in the present case, therefore, is not whether

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[...]

There is a balance between goal and means. The measures must be calculated to attain the goal expeditiously and effectively but the availability of resources is an important factor in determining what is reasonable.

<sup>121</sup> *Id.* at para. 99.

<sup>122</sup> *Minister of Health v. Treatment Action Campaign*, 2002 (5) SA 721 (CC) (S.Afr.), available at <http://www.constitutionalcourt.org.za> (last visited Nov. 10 2009).

socio-economic rights are justiciable. Clearly they are. The question is whether the applicants have shown that the measures adopted by the government to provide access to health care services for HIV-positive mothers and their newborn babies fall short of its obligations under the Constitution.<sup>123</sup>

Using the reasonableness metric applied in previous cases, the Court issued mandatory orders requiring the South African government to revise its Nevirapine distribution programme in order to:

- 1) “[R]emove the restrictions that prevent Nevirapine from being made available”;<sup>124</sup>
- 2) “[P]ermit and facilitate the use of nevirapine for the purpose of reducing the risk of mother-to-child transmission of HIV and to make it available for this purpose at hospitals and clinics when in the judgment of the attending medical practitioner acting in consultation with the medical superintendent of the facility concerned this is medically indicated, which shall if necessary include that the mother concerned has been appropriately tested and counselled”;<sup>125</sup>
- 3) “[M]ake provision if necessary for counsellors based at public hospitals and clinics other than the research and training sites to be trained for the counselling necessary for the use of nevirapine to reduce the risk of mother-to-child transmission of HIV”;<sup>126</sup>
- 4) “[T]ake reasonable measures to extend the testing and counselling facilities at hospitals and clinics throughout the public health sector to facilitate and expedite the use of nevirapine for the purpose of reducing the risk of mother-to-child transmission of HIV.”<sup>127</sup>

The *Certification*, *Soobramoney*, *Grootboom*, and *Treatment Action Campaign* cases collectively show the Court’s deliberate acceptance of the justiciability of socio-economic rights. The adjudication

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<sup>123</sup> *Id.* para. 25.

<sup>124</sup> *Id.* para. 135.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

of these rights appears well-within the constitutional duties, mandate, and powers of the Court.<sup>128</sup> Even if the text of the norms imposed limitations based on the availability of resources of the state, the Court did not treat the government's policies and distributive programs as political questions exclusively co-opted under the wisdom of the Executive or Legislative Branches. The Court's judicial review power extends even to these questions of policy because policy implementation entails the sufficiency of governmental action in relation to fundamental constitutional values. The Court's decided position on the justiciability of socio-economic rights ultimately reflects its own consciousness of constitutional ideology, and the importance of socio-economic rights to the fabric of the new socio-political order founded under the 1996 Final Constitution. Justiciability is not merely a judicial policy of the Court involving restraint or liberality in adjudication, but a broader decision to effectuate constitutional values in light of the Court's constitutional role.

#### IV. A PROPOSED TRIANGULATED THEORY ("PURPOSE-ROLE-NORM") TO DETERMINE THE JUSTICIABILITY OF SOCIO-ECONOMIC RIGHTS UNDER THE PHILIPPINE CONSTITUTION

South Africa presents an intriguing comparative lens for the Philippines due to two common elements shared by both constitutional systems. First, considering their respective political-social histories of social injustice, both countries textualized socio-economic rights in their Constitutions to express the normative primacy of these rights. Second, both countries re-conceptualized the power of judicial review of their respective constitutional courts, to enable these institutions to make judicious choices on their competence to adjudicate controversies involving constitutional rights. It is definitely a fact worth noting for the Philippine Supreme Court that the relatively-nascent South African Constitutional Court has been able to deploy its institutional powers to overcome the usual non-justiciability objections, using a clear methodology for adjudication of socio-economic rights. If socio-economic rights are indeed the "heart of the 1987 Constitution," as the Philippine Supreme Court acknowledges,<sup>129</sup> then the Court's policy-making processes on justiciability should be amenable to some constitutional rethinking. While the Philippine Supreme Court has declared some socio-economic rights provisions in the 1987 Constitution to be justiciable (such as the right to health in *Oposa v. Factoran*), the Court has not discussed a methodological framework that explains the Court's policy on justiciability vis-à-vis non-justiciability.

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<sup>128</sup> Significantly, the Court in these cases also fulfilled its task of interpretation with reference to international law standards on socio-economic rights. This is a judicial duty under section 39(1) of the South African Constitution.

<sup>129</sup> *ARIS Inc. v. Nat'l Labor Relations Comm'n*, G.R. No. 90501, (S.C. Aug. 5, 1991), available at <http://sc.judiciary.gov.ph/>.

Considering the institutional role and powers of the Court alongside the constitutional text, intent, and ideology in the 1987 Constitution's socio-economic rights provisions, I propose a triangulated theory ("Purpose-Role-Norm") on justiciability. When faced with a controversy involving a socio-economic right under either Articles II, XIII, XIV, or XV of the 1987 Constitution, the Court should simultaneously examine three factors. First, the Court could look at the *purpose of the justiciability constraint*, and whether, under the circumstances involving socio-economic right deprivations, maintaining a high justiciability threshold is consistent with the purpose of the justiciability constraint. Second, the Court should consider its *institutional role in the constitutional system* to see whether it can appropriately adjudicate a controversy involving socio-economic right deprivations. Finally, the Court should maintain its practice of investigating the *constitutional formulation of the norm providing for a socio-economic right*, taking into account the norm's text and drafting history (which includes its consistency with international treaty standards incorporated under the 1987 Constitution). This framework, patterned after the methodology of the South African Constitutional Court in its socio-economic rights jurisprudence, comprehensively undertakes a "purposive interpretation" of socio-economic rights in the 1987 Constitution.

#### A. *Purpose of the Justiciability Constraint*

In 2007, Professor Jonathan R. Siegel proposed a general theory of justiciability as one of "purposeful doctrine."<sup>130</sup> He argued that justiciability does not have a strict and reasonably discernible constitutional purpose. Justiciability stands apart from other standard constitutional provisions that either promote the interests of specific individuals or groups; require avoidance of specific evils; or ensure an accountability and representative structure in democratic government. Instead, various alternative purposes are attributed to justiciability, including, among others: (1) improving court performance by giving litigants a stake in the outcome of cases, encouraging a sharper presentation of issues to the courts ("litigation-enhancement theory"); (2) protecting the autonomy of groups *indirectly* affected by adverse judicial rulings, as when unsuccessful plaintiffs end up provoking the generation of judicial precedents that affect other persons similarly-classed ("representational theory"); (3) restraining courts from encroaching on the prerogatives of other co-equal branches of government ("separation of powers theory"); or (4) ensuring that courts can safely avoid socially difficult rulings ("passive virtues theory").<sup>131</sup> The fundamental problem with these theories, according to Professor Siegel, is that

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<sup>130</sup> Siegel, *supra* note 11.

<sup>131</sup> *Id.*



they often accomplish little or nothing other than to make judicial review needlessly cumbersome, and second, even where they appear to do something, the restraints that they impose are not well-aligned with any purpose that they are said to serve. Courts could improve justiciability doctrines by focusing on their purposes. Where justiciability constraints are purposeless, they should be discarded. Where they serve a purpose, there is at least the possibility that they should be retained.<sup>132</sup>

A purpose-driven justiciability doctrine would most likely impact on judicial policies on the importance and scope of adversity, standing, ripeness, and mootness.

Applying this model to the justiciability of socio-economic rights, the Philippine Supreme Court would have to weigh the purposes for which justiciability operates to constrain, at the threshold, the Court's exercise of its power of review. If the Court were to hold in favour of non-justiciability of a socio-economic right in the 1987 Constitution, it would then be burdened to show that there is at least a comparable constitutional purpose that animates the Court's rejection of competence to adjudicate in this particular controversial setting. This in itself is not something altogether unprecedented for the Philippine Supreme Court with its expanded judicial review and rule-making powers under the 1987 Constitution. Moreover, it should be recalled that in the *Certification* and *Soobramoney* cases, the South African Constitutional Court stressed the constitutional importance of the socio-economic rights involved over objections raised on the "propriety" of judicial intervention in these cases. As the South African Constitutional Court's jurisprudence has shown, the Court overrode objections based on the *litigation-enhancement*, *representational*, *separation-of-powers*, and *passive virtues* theories of justiciability. In this sense, the purpose-driven scrutiny of justiciability doctrine is entirely consistent with former Israeli Supreme Court President Barak's contextual and purposive interpretation model of adjudication for judges in modern democracies:

An important tool that judges use to fulfill their role in a democracy is determining justiciability. That is, judges identify those issues about which they ought not make a decision, leaving that decision to other branches of the state. The more non-justiciability is expanded, the less opportunity judges have for bridging the gap between law and society and for protecting the constitution and democracy. Given these consequences, I regard the doctrine of non-justiciability or "political questions" with

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<sup>132</sup> *Id.* at 177.

considerable wariness. Insofar as is possible, I prefer to examine an argument on its merits, or to consider abstaining from a decision for lack of a cause of action rather than because of non-justiciability. . . . My approach does not assume that the court is always the best institution to resolve disputes; indeed, I accept that certain disputes are best decided elsewhere. However, the court should not abdicate its role in a democracy merely because it is uncomfortable or fears tension with the other branches of the state. This tension not only fails to justify dismissing claims, it is even desirable on occasion. It is because of this tension that the freedom of the individual is guaranteed. . . . Overall, the benefit gained from a broad doctrine of non-justiciability is significantly smaller than the benefit gained from a narrow one.<sup>133</sup>

The South African Constitutional Court's socio-economic rights jurisprudence reflects decided responses to what President Barak describes as "normative justiciability" (whether there are legal criteria for determining a given dispute) and "institutional justiciability" (whether the dispute should be adjudicated in a court of law at all). As discussed in Part II, the South African Constitutional Court treated the availability of state resources as part of the *legal* considerations that form the parameters of a socio-economic right. By internalizing the requirement of reasonableness (something President Barak also discusses in his work as a "general principle of public law") in balancing the substantive content of the socio-economic right and its operative (and ideological) limitations,<sup>134</sup> the South African Constitutional Court adequately justified its doctrinal rejection of normative non-justiciability. Finally, the Court also overcame objections based on institutional justiciability by reiterating its express constitutional role in applying the Bill of Rights in the 1996 Final Constitution.

The Philippine Supreme Court has accepted various public interest reasons ("cases of transcendental paramount importance") to exempt a case or controversy from justiciability requirements. Layering in a purpose test to its determination of justiciability of socio-economic rights does not conceivably depart from the Court's record of accepting exemptions from the justiciability requirement. The purposive test on justiciability compels the Court to be transparent on its use of justiciability as a mechanism for self-regulation (e.g. checking its institutional justiciability), as well as for testing the presence of genuine legal adversity (e.g. checking normative justiciability). Considering the constitutional

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<sup>133</sup> Barak, *supra* note 31, at 177–178.

<sup>134</sup> *Id.* at 180.

importance of socio-economic rights to the achievement of the rejuvenated political-social democratic order under the 1987 Constitution, the Court has an implicit duty to make its policy-making on justiciability both process-transparent and outcome-predictive.<sup>135</sup>

B. *Institutional Role of the Supreme Court in the Philippine Constitutional System*

Part I already extensively discusses the enlarged role of the Philippine Supreme Court in the definition and enforcement of constitutional rights, particularly through the expanded power of judicial review under Article VIII, § 1 (which provides for the “grave abuse of discretion” standard), and rule-making on constitutional rights under the 1987 Constitution, Article VIII, § 5(5) (Phil.). To briefly reiterate, the Philippine Supreme Court has a unique role in the protection of constitutional rights. A broad view of justiciability is compatible with the Court’s constitutional role.

Moreover, the Court is essential to the incorporation of international legal standards within the Philippine constitutional system. For instance, Article VIII, § 1 provides that “generally accepted principles of international law form part of the law of the land.”<sup>136</sup> During the drafting of the 1987 Constitution, the Philippines had already been an active participant in the development of international human rights and humanitarian law. The Philippines was one of the original forty-eight signatories to the United Nations Declaration,<sup>137</sup> officially joining the United Nations as a founding member on October 24, 1945. Prior to the adoption of the 1987 Constitution,<sup>138</sup> the Philippines had already ratified the following international instruments:<sup>139</sup>

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<sup>135</sup> For a thorough discussion arguing in favor of institutional duties to advance positive rights, see ALAN GEWIRTH, *THE COMMUNITY OF RIGHTS* 38–44 (University of Chicago Press 1996).

<sup>136</sup> CONST. (1987), ART. VIII, § 1 (Phil.).

<sup>137</sup> The Philippines was one of the twenty-two subsequent adherents to the January 1, 1942, United Nations Declaration, which had twenty-six original signatories.

<sup>138</sup> The 1987 Constitution was drafted and adopted by the 1986 Constitutional Commission on October 15, 1986, and took effect upon ratification by the Filipino people in a plebiscite on February 2, 1987.

<sup>139</sup> See ratification history at <http://www.bayefsky.com> and <http://www2.ohchr.org> (last visited Nov. 10, 2009). Subsequent to the promulgation of the 1987 Constitution, the Philippines also ratified the remaining two major human rights treaties, the Convention on the Rights of the Child (CRC) which was ratified on August 21, 1990 and entered into force on September 20, 1990, and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW) which was ratified on July 5, 1995 and entered into force on July 1, 2003. The Philippines signed the Convention on the Rights of Persons with Disabilities on September 25, 2007.

- 1) International Convention on Civil and Political Rights (ICCPR)<sup>140</sup>
- 2) International Convention on Economic, Social and Cultural Rights (ICESCR)<sup>141</sup>
- 3) Convention on the Elimination of Racial Discrimination (CERD)<sup>142</sup>
- 4) Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)<sup>143</sup>
- 5) Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)<sup>144</sup>
- 6) International Convention on the Suppression and Punishment of the Crime of Apartheid<sup>145</sup>
- 7) Convention on the Prevention and Punishment of the Crime of Genocide<sup>146</sup>
- 8) 1949 Geneva Conventions, along with other landmark instruments on international humanitarian law.<sup>147</sup>

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<sup>140</sup> Ratified on October 23, 1986. First Optional Protocol ratified on August 22, 1989, entered into force on November 22, 1989. Second Optional Protocol ratified on November 20, 2007, entered into force on February 20, 2008.

<sup>141</sup> Ratified on June 7, 1974, entered into force January 3, 1976.

<sup>142</sup> Ratified on September 15, 1967, entered into force January 4, 1969.

<sup>143</sup> Ratified on August 5, 1981, entered into force September 4, 1981. Amendment on Article 20(1) accepted on November 12, 2003. Optional Protocol in relation to Articles 8, 9, 10 ratified on November 12, 2003, entered into force on February 12, 2004.

<sup>144</sup> Ratified on June 18, 1986, entered into force on June 26, 1987. Amendment on Articles 17(7) and 18(5) accepted on November 27, 1996.

<sup>145</sup> Signed on May 2, 1974, and ratified on January 26, 1978. See [http://treaties.un.org/Pages/ViewDetails.aspx?src=UNTS&tabid=2&mtmsg\\_no=IV-7&chapter=4&lang=en#Participants](http://treaties.un.org/Pages/ViewDetails.aspx?src=UNTS&tabid=2&mtmsg_no=IV-7&chapter=4&lang=en#Participants) (last visited Nov. 30, 2009).

<sup>146</sup> Signed on December 11, 1948, and ratified on July 7, 1950. See [http://treaties.un.org/Pages/ViewDetails.aspx?src=UNTS&tabid=2&mtmsg\\_no=IV-1&chapter=4&lang=en#Participants](http://treaties.un.org/Pages/ViewDetails.aspx?src=UNTS&tabid=2&mtmsg_no=IV-1&chapter=4&lang=en#Participants) (last visited Nov. 30, 2009).

<sup>147</sup> See <http://www.icrc.org> (last visited Nov. 10, 2009).

The Philippines has already ratified the: 1) June 17, 1925 Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare; 2) July 27, 1929 Convention for the Amelioration of the Condition

Ultimately, what the framers of the 1987 Constitution did was not merely to textualize universalist norms in Constitutional language, but provide for universalist mechanisms and institutions that reify the primacy of individual rationality over strong state prerogative. What the Constitutional Commission of 1986 accomplished by expressly maintaining and enhancing the Incorporation Clause in the 1987 Constitution—under the foresight that the Philippines must abide by principles “*the observance of which would necessary to the preservation of the family of nations*”—was to build into our Constitutional system an innovative “backdoor” provision through which international norms may enter, even as these norms continue to evolve and develop with State practices. In light of its expanded judicial review and rule-making powers, the Philippine Supreme Court also assumes a gatekeeping role with respect to international legal standards. Its determination of the justiciability of socio-economic rights should also correspond with its role in the interpretation and application of international legal standards on socio-economic rights. These standards do not merely pertain to the substantive content of the socio-economic rights *per se*, but also to the rights’ structural and conceptual limitations. Examples of these limitations include the distinction between “obligations of conduct,” “obligations of result,” and “obligations to respect, protect, and fulfil;” the definition of “appropriate means,” “full realization,” and “progressive achievement,” and availability of resources.<sup>148</sup> This is precisely what the South African Constitutional Court undertook in accepting the

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of the Wounded and Sick Armies in the Field; 3) July 27, 1929 Convention relative to the Treatment of Prisoners of War; 4) December 9, 1948 Convention on the Prevention and Punishment of Genocide; 5) November 26, 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity; 6) April 10, 1972 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxic Weapons and on their Destruction; 7) June 8, 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II); 8) October 10, 1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects; 9) October 10, 1980 Protocol on Non-Detectable Fragments (Protocol I); 10) October 10, 1980 Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (Protocol II); 11) October 10, 1980 Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III). The Philippines had also already signed the: 1) May 14, 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict; 2) May 14, 1954 Protocol for the Protection of Cultural Property in the Event of Armed Conflict; and 3) June 8, 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I).

<sup>148</sup> See MATTHEW C. R. CRAVEN, *THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL, AND CULTURAL RIGHTS: A PERSPECTIVE ON ITS DEVELOPMENT* 106–152 (Oxford University Press 1995).

justiciability of socio-economic rights in the *Certification, Soobramoney, Grootboom*, and *Treatment Action Campaign* judgments.<sup>149</sup>

C. *Normative Investigations on the Constitutional Formulation of Socio-Economic Rights*

The last aspect of this proposed triangulated theory is relatively uncontroversial. Scrutiny into the text and drafting history of the socio-economic provision in the 1987 Constitution is simply standard canon of constitutional interpretation. This aspect should not be neglected in our proposed model for determining justiciability, because it necessarily completes the task of judicial balancing. To reiterate, under the *Manila Prince Hotel*<sup>150</sup> standard established by the Philippine Supreme Court, all provisions of the 1987 Constitution are presumed to be self-executing. Before a socio-economic right could be characterized as precluding actionability, the Court should prudently engage in normative investigations on constitutional text, structure, intent, ethos, ideology, and precedents.<sup>151</sup>

V. CONCLUSION

For the most part, socio-economic rights in the 1987 Constitution have lain dormant and under-utilized because of the Philippine Supreme Court's characterization of these norms as "aspirational" or non-justiciable under *Basco*.<sup>152</sup> The judicial tendency rejecting constitutional scrutiny of these norms deters the effective invocation of socio-economic rights by the socio-economically deprived in the Philippines. This cannot be countenanced in a maturing modern democracy such as the Philippines, and more so under a Philippine Supreme Court that is vested with extraordinary powers and roles as judges in Philippine democracy.

Comparative examination of the South African Constitutional Court's jurisprudence on socio-economic rights sets a useful paradigm for the Philippine Supreme Court to rethink its archaic position on the justiciability of socio-economic rights. Time and again, the Philippine Supreme Court under the 1987 Constitution has issued landmark human rights judgments, not just on civil and political rights but also on social

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<sup>149</sup> See Gerard Hogan, *Judicial Review and Socio-economic Rights*, in HUMAN RIGHTS, THE CITIZEN AND THE STATE: SOUTH AFRICAN AND IRISH APPROACHES 1–12 (Round Hall 2001).

<sup>150</sup> *Manila Prince Hotel v. Gov't Serv. Ins. Sys.*, G.R. No. 122156, (S.C. Feb. 3, 1997) (en banc), available at <http://sc.judiciary.gov.ph/jurisprudence/1997/feb1997/122156.htm>.

<sup>151</sup> See KEITH E. WHITTINGTON, *CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW* (University Press of Kansas 2001).

<sup>152</sup> *Basco v. Phil. Amusements & Gaming Corp.*, G.R. No. 91649, (S.C. May 14, 1991) (en banc), available at <http://sc.judiciary.gov.ph/>.

rights such as the inter-generational rights to health and balanced ecology in *Minors Oposa v. Factoran*. The Court stands unique among other jurisdictions for radically (and repeatedly) ruling that the Universal Declaration on Human Rights (an instrument internationally-deemed to be non-binding) as having legal effect in the Philippines. In this sense, the Court appears conscious of its adjudicating, rule-making, and gatekeeping roles under the present constitutional system in the Philippines. There is no conceivable reason why the Court cannot now harness its constitutional authority to overcome the largely self-imposed (and not constitutionally-predicated) restraint of justiciability for socio-economic rights.